IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 3.

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

APPENDIX TO PETITION FOR REHEARING.

CHICAGO BAR RECORD

PUBLISHED BY THE CHICAGO BAR ASSOCIATION

VOL. XXIX JULY, 1948 NO. 6

Will *Your Clients* Get Full Benefit of New Tax Law?

Married couples whose combined assets, including life insurance, amount to about $100,000 or more should review their wills and estate plans with their attorneys to obtain full advantage of the new "marital deduction."

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CHICAGO BAR RECORD

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As the official publication this magazine carries authoritative information about the activities of the Chicago Bar Association. Neither the Association nor the Editors, however, assume responsibility for statements or expressions of opinion by contributors.

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CHICAGO BAR RECORD

JULY, 1948

AND YOUR EDITORS WILL EVER PRAY--

The Revenue Act of 1948 provided welcome relief for taxpayers in all brackets. It also posed plenty of problems for lawyers, especially in connection with the estate and gift tax amendments.

An overflow crowd of members heard the very helpful and instructive lecture, "The New Marital Deduction for Gift and Estate Taxes Under the 1948 Revenue Act," delivered by Don H. McLucas at the rooms of the Association under the sponsorship of the Committee on Federal Taxation. A reprint of this talk has been made available through the courtesy of The Northern Trust Company, which has distributed the pamphlet to all lawyers in the Chicago area.

"Drafting Problems in Wills Under the Federal Revenue Act of 1948" which appears in this issue of the RECORD, is the text of a lecture delivered at the Association by Austin Fleming, also of The Northern Trust Company, as a part of a program arranged by the Committee on Probate Practice. The companion lecture, "Use of Insurance Options Under the 1948 Revenue Act," presented at the same meeting by John H. Overbeck, Jr., will be published in our next issue.

This issue also contains "Property Law Still Has Tax Consequences," the first of two papers read by Daniel M. Schuyler at luncheon meetings of the Association, and "Proposed Legislation Concerning Illinois Utilities," a report on bills drafted by the Committee on Public Utility Law during eight years of careful work. "Amendment of the Revenue Article of the Illinois Constitution," by Walter J. Cummings, Jr., is a scholarly discussion of a timely and to some extent controversial issue. Mr. Cummings is a member of the Committee on Constitutional Convention and his paper is one of a series prepared by members of that committee dealing with the problems of constitutional revision in Illinois.

It is a healthy sign of the vigorous and constructive work of the Association that these authoritative guides to current problems have all been prepared by members of the Association and presented in connection with the regular activity of our committees.

Survey

The Younger Members' Committee is sponsoring an economic survey of Chicago lawyers (not limited to members of the Chicago Bar Association) conducted with the assistance of Professor Leonard Kent of the Graduate School of Business of the University of Chicago. Questionnaires are being mailed to approximately 2,000 lawyers, chosen in such a manner as to constitute a sample representative of the profession in Chicago. A summary of the results, including correlations of income data with educational background, type of practice or employment, and other information, will be published in a future issue of the RECORD. All who receive questionnaires are earnestly requested to cooperate by filling out and returning them, promptly and anonymously.

We regret that regular publication of the RECORD has been interrupted by a work-stoppage in the printing trades. Publication was suspended during the months of March, April, May and June, 1948.

CRIMINAL LAW IN VIGNETTE

By Charles C. Arado

Constitutional and statutory provisions declare the illegality of a coerced confession wrung by police officers regardless of the depravity of the crime or suspect. Nevertheless, a violation of these protective measures in behalf of an accused person persists as a common practice. The third degree, as a substitute for judicial inquiry, contaminates criminal law procedure at its source.

A defendant is presumed sane. That presumption does not extend to evidence, nor is it to incline the minds of jurors to a belief of sanity. It is simply a rule of law to establish the burden of proof when insanity is interposed. By reason of that law, the defense is called upon to introduce some evidence of insanity in order to raise this issue. Were the evidence to end upon conclusion of proof of insanity by the defense, honor and justice would compel a jury to find the defendant insane. No alternative decision could be reached unless the jury concluded that these witnesses were perjurers or their testimony incredible. As soon as this evidence of insanity is before a jury, the prosecution assumes the burden of establishing sanity by proof beyond a reasonable doubt.

A prosecutor seeks to avoid a compromise in penalty that may be inspired by a plea of insanity. Upon a failure of the defense to establish legal insanity, he urges the jury to apply the punishment they would impose in the ordinary case. Sympathy is not to be extended to the defendant because of his emotional instability or abnormality. The State's attorney maintains that mental weakness or deficiency is immaterial unless it precludes ability to recognize the difference between right and wrong or the faculty of choosing the right and avoiding the wrong. This is a sound exposition of the law although directly counter to principles of medical science holding that the mental condition of the defendant is the basic factor to determine moral responsibility for the commission of a crime.

While drunkenness forms no excuse for a criminal act, it is admissible upon the issue of intent. If the intoxication is of such a degree that it suspends entirely the power to reason, no crime can be committed. The difficulty of establishing insanity based upon chronic alcoholism must be apparent. If the intoxication minimizes the degree of deliberation and malice accompanying the act in a case where the jury has the burden of fixing the punishment, that circumstance should be considered in arriving at the penalty. Here too the difficulty of using drunkenness as grounds for extenuation is well-nigh insurmountable. The prosecutor stresses the contention that when the intoxication is voluntary the defendant becomes legally responsible for his subsequent conduct.

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DRAFTING PROBLEMS IN WILLS UNDER THE FEDERAL REVENUE ACT OF 1948

By Austin Fleming

The purpose of this discussion is to consider the effect of the Federal Revenue Act of 1948 on specific provisions frequently employed in the preparation of wills.

Lawyers arrange wills in different ways, but one of the more common arrangements is that which begins with a payment of debts and tax clause, followed by provisions covering personal effects and legacies, and then a residue clause which either gives the property outright or places the estate in trust with particular distributive provisions. Where the residue is placed in trust, the dispositive provisions are followed by various administrative clauses, such as a spendthrift clause, facility of payment clause, undistributed income clause, undivided interests clause, trustee's powers, successor trustee provisions, and finally, by the designation of an executor.

This order will be adopted in the remarks which follow.

Tax Clauses

As to the tax clause, the form most frequently used by attorneys is one which directs the executor to pay all death taxes, both estate and inheritance, from the residuary estate without seeking reimbursement from or charging any person for any part of the taxes so paid. This form of clause would still appear to be appropriate and proper under the new law, subject only to these observations: Some tax clauses specify that death taxes shall be treated as expenses of administration chargeable against the estate generally. With the new concept of "adjusted gross estate" appearing in the new law, which means in essence the gross estate less expenses of administration and widow's award, such a clause may create confusion as to whether the marital fund is or is not intended to bear a part of the tax burden. To avoid any question, would it not be preferable to direct specifically that all such taxes should be paid or provided for out of the residuary estate, in terms?

Also, care must be exercised in the use of waiver of reimbursement clauses, particularly in cases where section 826(d) of the Internal Revenue Code applies, giving the executor of an estate a right of reimbursement with respect to appointive property unless the donee directs otherwise in his will. Where a marital trust is created with a general power in the surviving spouse to appoint the corpus by will, the value of the marital assets will, of course, be included in such spouse's estate at the time of her* death for Federal estate tax purposes. In many cases the spouse's estate will not be sufficient to pay the tax so assessed, in full, or the spouse may not wish her entire estate to be used for the payment of taxes imposed by reason of the inclusion of the marital fund in her taxable estate. In such cases it is important to see that the tax clause in the will of the surviving spouse does not waive any reimbursement rights conferred by section 826(d) of the Code. An additional sentence in the tax clause to the following effect may be desirable:

> **This paragraph shall not be construed as a waiver of any right of reimbursement of any such taxes imposed with respect to any property over which I may have a power of appointment, and to which reimbursement the Executor of my estate would otherwise be entitled by law.**

*The feminine pronoun is to be read as including the masculine, whenever applicable throughout this paper.

The personal effects and legacy clauses raise no special problems. Such gifts, when made to the surviving spouse, will qualify for a marital deduction and should not be overlooked in making calculations.

The Marital Fund

As to clauses establishing the marital fund itself, there is at the outset the question of whether there is any objection to tying the amount of the fund to the exact amount allowable as a marital deduction, particularly in view of the fact that there may be a long lapse of time before values for Federal estate tax purposes are finally determined. No legal objection is seen to such a provision. In fact, it approximates most nearly the community property system without any undershooting or overshooting. The only problem presented is one of computation and the necessity for making required adjustments when final figures are obtained. This is not easy, of course, but it is not essentially different from the familiar process of arriving at the exact amount of a charitable gift expressed in terms of a percentage of the residue of an estate. The indeterminate form of such a provision nevertheless appears to have troubled some attorneys, and they have indicated a preference for a definition of the marital fund in terms of a dollar amount. Where this method is employed, it will be necessary to review the will frequently and by codicil or new instrument make necessary upward or downward revisions, as the value of the estate changes from time to time.

Estates over $60,000 in value but less than $120,000 present a special drafting problem in creating a marital trust of the proper size. Where the balance of the estate is also left in trust for the benefit of the spouse or descendants, it will ordinarily not be desired to create a marital fund greater than the difference between the tax exemption and the adjusted gross value of the estate. The following provision may be considered in such cases:

> **. . . an amount equal to fifty per cent (50%) of the value of my adjusted gross estate as finally determined for Federal estate tax purposes (but in no event in excess of the difference between the value of my adjusted gross estate and the amount of the exemption allowed for the purpose of determining the so-called additional or tentative Federal estate tax), less the aggregate amount of marital deductions, if any, allowed by reason of interests in property passing or which have passed to my wife otherwise than by the terms of this paragraph of my Will.**

Most forms for the establishment of a marital trust fund operate as a separate bequest ahead of the residuary article. The reasons for this arrangement are twofold: to provide the maximum deduction with the greatest tax savings through the fact that by not being a part of the residuary estate, it bears no share of taxes; and to obviate the necessity for the application of the very difficult algebraic computation required if taxes are to be taken into account in arriving at the amount of the marital fund. The amount of the tax cannot be computed until the amount of the deduction has been determined, and the amount of the deduction cannot be determined until the amount of the tax has been computed. The problem is further complicated by differences in rates and methods of computation between the basic Federal estate tax and the additional Federal estate tax, and between each of them and State inheritance taxes.

It has been asked why the marital gift must take the form of a bequest ahead of the residuary and whether it is not possible to provide that the residue should be divided into separate trusts with the trustee, rather than the executor, making allocation, and to direct the tax burden to be shifted to the non-marital fund.

reason is seen why this arrangement cannot be followed with the same result, although it would seem that the net effect is to make the marital fund in fact a special trust ahead of what is really the residuary. The important thing is that in order to qualify under the statute, the marital fund must be a distinct and separate trust. It will not do to place the residue in trust with the income payable entirely or in part to the surviving spouse for her life and a general power of appointment in the spouse over one half of the corpus at her death. The law is clear that in order to qualify for a marital deduction, the power of appointment must apply to the entire corpus of the trust.

In whatever way the attorney chooses to phrase the marital clause, he should not overlook negativing expressly the operation of paragraph (C) of the new law which says in effect that if interests passing to the spouse may be satisfied out of ineligible assets, the value of such interests will be reduced by the aggregate value of such ineligible assets. The surest way to negative this provision is to specify that in no event shall the executor or trustee satisfy the gift out of assets or proceeds of assets with respect to which a marital deduction would not be allowed if so included.

Whether it is advisable to provide for a marital deduction in every case of a married person with an estate larger than that of his spouse, and, if so, whether the maximum marital deduction should be claimed, are estate planning questions, the exploration of which would take us afield from our purpose. Suffice it to say that in the estate of the first spouse to die admittedly large tax savings are obtainable through the device of marital deduction. The alternative of not providing for a marital fund may be a renunciation of the will and the taking of statutory benefits which will qualify for a marital deduction. Each case must, of course, be considered on its own facts and particular circumstances, but in many cases it will undoubtedly prove advantageous to claim the largest possible amount of marital deduction, even though it may appear that by doing so the combined tax bills in the two estates are increased. The value of the use of the property by the surviving spouse in the interim more than offsets the added cost to the remaindermen, and many changes in values, tax laws and rates may occur in the meantime which will invalidate the initial calculations and assumptions as to the amount of taxes payable upon the death of the surviving spouse.

Common Disaster Clauses

This leads to a brief remark about the use of common disaster clauses, and when, if ever, a marital gift should be conditioned on survival for a period of time up to six months as permitted by the statute. Generally speaking, if it is advisable to claim a marital deduction at all, it would seem to be equally advisable whether the spouse survives by one day or many years, and accordingly, where a marital fund is established it follows that the draftsman will not ordinarily wish to condition the gift on survival for any particular period of time. There are two exceptions to this conclusion: One relates to the case of outright gift of the entire estate to the surviving spouse. In such case section 812 (c) of the Internal Revenue Code as amended by the new law, dealing with credit for previously taxed property, provides no deduction for any property received from a previously deceased spouse. Should a surviving spouse who is given the entire estate outright die within a short period after the death of the first spouse, the entire estate, and not just half, would be taxed again in the estate of the surviving spouse. In such a situation it would seem that the draftsman would wish to consider the inclusion of a six month common disaster clause, in order to avoid double taxation of the estate should the surviving spouse die within that period. The second exception applies where the estates of the two spouses are so nearly

equal in amount that the combined tax bills on their deaths will be much greater through the use of the marital device than would otherwise be the case. In those cases, should death of the surviving spouse occur within six months, it might be advantageous not to have the marital gift apply and to have the estate of the spouse first dying taxed as though he were the sole survivor.

The requirements of the statute with respect to a power of appointment in the surviving spouse over the entire marital fund are clear and require no special comment. However, the question does arise as to whether it may be provided that the trustee may rely on a will admitted to probate in any jurisdiction without waiting for the period of contest to elapse; and also assume that the spouse has died intestate in case no will is found within a certain number of months after death. Such a clause operates only after the death of the spouse, is purely procedural and in no way affects substantive rights in case a will is later found and admitted to probate. Accordingly, no objection is seen to the use of such a clause and it has the value of facilitating administration.

It is now clear that the inclusion of provisions naming takers in default of the exercise of the power of appointment will not defeat the right to an estate tax marital deduction otherwise allowable. The Senate Committee report, and more recently an explanatory letter of the Deputy Commissioner dated May 4, 1948, support this conclusion.

Next to be considered are clauses dealing with the administration of marital trusts and questions as to which are compatible with an estate tax marital deduction.

All of the Income

The statute says that the marital deduction is available with respect to a marital trust only if the surviving spouse is entitled for life to "all of the income" from the corpus of the trust, payable annually or at more frequent intervals. Does "all of the income" mean gross income, or income after deducting trustee fees and ordinary expenses? The Senate Committee report explains that the term "income" is used in the same sense as that in section 162 of the Internal Revenue Code relating to the taxation of income of estates and trusts. That section speaks of the "net income" distributable to a beneficiary and states that net income in the case of estates and trusts is to be computed on the same basis and in the same manner as in the case of an individual, with certain exceptions. From this it would appear that the phrase "all of the income" does not mean gross income, but something less. This almost has to be the case; otherwise the trustee would be unable to pay taxes, insurance premiums, and other customary charges and expenses incurred in the management of the trust property. But section 162 of the Code deals with income only for income tax purposes and not trust accounting purposes. It is believed that the statutory language in the new Act should be construed as synonymous with "net income" as determined by applicable State law. However, until the matter is clarified by official ruling or regulation many attorneys will be hesitant about using the phrase "net income" and will prefer to use the statutory words "all of the income" or simply, "the income." From a trust accounting point of view, the result should be the same whether the words "all of the income," or "the income," are used, for the Illinois Principal and Income Act defines income as gross income less statutory charges.

There is one word of caution. Should not the same terminology employed regarding the income of the marital fund also be used in connection with the income from the non-marital fund? To say "all of the income" in the marital provision and then to use the phrase "net income" in the residuary provisions may raise construction problems as to the testator's intentions. It would seem preferable to use the same expression in all reference

throughout the will, so that no confusion as to intention will result.

The requirement for annual or more frequent distributions of income is clear. It means, of course, that no accumulation provisions, discretionary or mandatory, will be permitted if the marital fund is to qualify for tax deduction.

Encroachment

What about an encroachment clause giving the trustee power to use a part or all of the principal of the marital fund for the benefit of the spouse? The language of paragraph (F) of the Act reads: "With no power in any other person to appoint any part of the corpus to any person other than the surviving spouse." A power in the trustee to pay sums of principal to the surviving spouse is compatible with this provision, and it is believed that an encroachment clause is fully authorized by the Act. However, care must be used to limit the scope of the encroachment clause to the surviving spouse alone. Many attorneys employ forms of encroachment clauses which embrace not only the spouse, but also children and other dependents, and such clauses as applied to marital funds will, of course, require revision. The argument has been made that as to minor children the surviving spouse has a legal obligation of support and that this circumstance ought to justify the inclusion of such children within the embrace of a marital encroachment clause. However, this would seem hazardous until an official ruling or regulation is issued sanctioning it. The only safe course is to confine to the spouse alone the encroachment clause governing the marital fund.

One further comment may be made as to the encroachment clause. Where the surviving spouse is also the beneficiary of a non-marital fund and an encroachment clause is included in the non-marital, as well as the marital, fund for the benefit of the spouse, a question may arise as to the corpus to which the trustee should first have recourse. Generally speaking, it will be desired to deplete the marital fund first. Accordingly, the draftsman should consider including an additional phrase in the encroachment clause governing the non-marital trust to the general effect that the trustee should take into consideration all other income and cash resources available to the spouse for the purpose from all sources "including the income and principal of the marital trust."

A power in the spouse to withdraw all or any part of the corpus of the marital fund on request would also appear to come within the statutory language of paragraph (F), "with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse. . .)." The Senate Committee report indicates that the term, "power to appoint" as used in the law includes any power which in substance and effect is such a power regardless of the nomenclature used in creating the power and local property law connotations. Accordingly it is believed that a power of withdrawal in the surviving spouse may safely be included in marital trust fund provisions.

Next is the question of the compatibility of the facility of payment or disability clause which gives the trustee the privilege of paying income otherwise distributable to a person under legal disability or other incapacity, in various ways, as through a legal guardian or conservator, or by the trustee itself applying the income for the use of the beneficiary. The present feeling is that such a clause is unobjectionable and will not defeat the right to an estate tax marital deduction provided that there is in such a clause no requirement or discretion in the trustee to accumulate any income not needed by the beneficiary. Any provision for accumulation of income may, as already indicated, forfeit the deduction, but a provision which directs that all income distributable to a beneficiary shall be paid out by the trustee in such one or more of the optional methods usually provided, would seem to be proper and fall within the

statutory language of the spouse being "entitled" to all of the income. However, all such clauses should be reviewed to make certain that they permit no discretion in the trustee to accumulate and perhaps also to narrow the optional methods of making distribution to the spouse directly, or to her legal representative, or by the trustee itself using such income for the benefit of the spouse.

Spendthrift Clauses

What about the use of a spendthrift clause as applied to the marital fund? The general belief at this time is that such a clause is compatible with the law and does not limit or circumscribe the exercise of the general power of appointment over corpus by the spouse "alone and in all events." Moreover, the clause does not make inapplicable the general rule as to the right of a beneficiary's executor or administrator to sums due at the beneficiary's death. Griswold, *Spendthrift Trusts* (Second Edition) page 419. However, many attorneys in this State having in mind *Cocdery* v. *The Northern Trust Company*, 321 Ill. App. 243, 53 N.E.(2) 43 (1944), may have some hesitation about the use of a spendthrift clause as applied to marital trusts. In that case, the Appellate Court held that a spendthrift clause operated to preclude the payment of income in the hands of the trustee at the death of the beneficiary to her estate, since to do so would make it available for creditors. It would seem advisable for the draftsman to scrutinize the form of spendthrift clause customarily used by him with the new law in mind. Until the effect of a spendthrift provision on the right to an estate tax marital deduction is resolved by official ruling or regulation, the draftsman may feel that this is one of the clauses which may be omitted without serious effect on the general purpose of the trust.

The same considerations and conclusions apply in regard to the so-called undistributed income clause, the effect of which is to direct that upon the death of the beneficiary any undistributed and accrued income shall be paid over as income to the next taker of income or corpus. Such a clause has the effect of sending undistributed and accrued income along with corpus to the appointee if the spouse exercises her power of appointment, or to the takers in default, if she fails to exercise the power. Section 4 of the Illinois Principal and Income Act specifically deals with the situation and many attorneys may feel that this clause could be omitted without serious effect until its use is sanctioned by official ruling or regulation, rather than to risk any possible forfeiture of an estate tax marital deduction.

A common provision in wills is one authorizing the trustee to hold several trusts or shares created under the instrument as a common fund dividing the income among the several trusts or shares proportionately. Where the balance of the estate is held in trust for the benefit of the surviving spouse, may it not be argued that such a clause is susceptible of a construction that, instead of separate trusts, it operates in effect to establish only one? If it were to have such effect, it would defeat the right to an estate tax marital deduction for the reason that the surviving spouse would not have a power of appointment over the entire corpus. Accordingly, it would appear that the use of such a provision is hazardous. On the other hand, it would not seem objectionable to include a provision authorizing the trustee to assign undivided interests in the assets of the estate to the several trusts and to make joint investments of funds.

Powers

Next to be considered are the trustee powers. Many attorneys use broad investment clauses and trustees prefer it this way. However, under a broad investment clause it is possible for a trustee to invest trust funds in assets constituting terminable interests as defined by the new law. Does such an investment power in the

trustee defeat the right to an estate tax deduction? The only provision in the law that appears to bear on the question is that of paragraph B(iii). It declares that no deduction shall be allowed with respect to a terminable interest if such interest is to be acquired for the surviving spouse "pursuant to directions of the decedent by his executor or by the trustee of a trust." A power in the trustee is not a "direction" from the decedent, and the feeling is that a power to invest moneys in terminable interests should not disqualify a marital trust for a tax deduction, unless it is evident that such an investment power is merely a subterfuge.

Most forms of trustee's powers include provisions authorizing the trustee to amortize bond premiums and discounts, and in general to determine what is income and what is principal and how all receipts and disbursements shall be credited, charged, or apportioned as between income and principal. Does this authority in the trustee jeopardize the marital deduction? The belief is that this power is probably unobjectionable and should not disqualify the trust for an estate tax marital deduction. However, attention is called to the line of cases of which *Dumaine* v. *Dumaine*, 301 Mass. 214, 16 N.E.(2d) 625 (1938), is a leading decision holding that a power in the trustee to determine what is income and what is principal does not confine the trustee to questions of doubt under local law, but permits the trustee to make determinations contrary to local law. In a jurisdiction following this line of authority, such a clause would permit the trustee to declare that which would ordinarily be income to be principal and circumvent the statutory direction that all income from the marital fund must be paid annually to the spouse. No Illinois decision on the question has been found, but it is believed that such a power in the trustee, unless carefully drafted, might jeopardize the marital deduction. Since the Illinois Principal and Income Act covers the majority of problems raised in regard to matters of income and principal, it would seem that until an official ruling or regulation is obtained covering the point, the more prudent course would be to omit such provisions from the trustee's powers.

The final point in regard to drafting wills containing trust provisions is the matter of the inclusion of a renunciation clause directing that in the event of renunciation, the will should be construed as if the spouse had predeceased the testator. Whatever hesitation there may have been heretofore about including such a clause in a will, it would now seem almost a "must." Particularly is this true where the interests passing to the spouse do not approximate the marital deduction, for by renouncing the will and taking statutory benefits, a marital deduction may be claimed to the extent of such benefits. This is an added inducement to renunciation; and since the Illinois law is such that remainder interests contingent upon the death of the life beneficiary will not be accelerated by renunciation, it becomes doubly important to provide that in case of renunciation, the will shall be read as if the spouse had predeceased the testator.

Spouse's Will

A final word remains to be said in regard to the will of the surviving spouse. All such wills should, of course, be reviewed in the light of the new law and where the will gives the entire estate to the other spouse, the remarks already made as to the use of the common disaster clause apply. In many cases the inclusion of a six-month clause will be warranted in order to avoid the imposition of additional taxes, should both spouses die within the period. The tax clause should also be carefully scrutinized particularly with reference to waiver of rights of reimbursement.

Lastly, the will should deal with any power of appointment which such spouse may have under any marital trust fund established by the other spouse. If it is desired to exercise such power, the exer-

cise should refer specifically to the power. On the other hand, if it is not desired to exercise the power, a provision should be included expressly negativing such exercise, since the Illinois law is such that under some circumstances a residuary clause may constitute an exercise of a power of appointment even though no reference to the power is made. Such a negativing of an exercise of the power may be accomplished by including in the residuary clause the words: "But expressly excluding any property over which I may now or hereafter have power of appointment."

APPLICATIONS FOR MEMBERSHIP

Each member of the Association is urged to scrutinize the following list of persons who have filed applications for membership. Ten days after the mailing of this list, the Committee on Admissions will begin the work of interviewing applicants whose names are here published. Members should deem it their duty to advise the Committee on Admissions as to the fitness or unfitness of any applicant and feel assured that the committee is always appreciative of assistance rendered. The information here furnished includes the name of the applicant, his address, date of admission to the bar and endorsers.

WILLIAM L. BLAKE, 111 W. Washington St., Ill., Feb. 14, 1929, Minn., Aug., 1925; Joseph D. Shelly, C. R. Davis.

JOSEPH W. BOYD, 141 W. Jackson Blvd., Oct. 10, 1935; Lee Soltow, John I. Mayer.

RICHARD J. BYRNE, 3175 N. Lincoln Ave., Jan. 12, 1948; Donald E. Bateman, Harry F. Polos.

OLEN R. CLEMENTS, 29 S. LaSalle St., Ill., Oct. 4, 1916, Ind., 1918, Fla., 1924, N. Y., 1933; Austin L. Wyman, Henry F. Vallely.

JOHN DONALD DEVANEY, 184 W. Lake St., Jan. 12, 1948; William V. Brooks, Charles J. Clusman.

CARL DEVOE, 231 S. LaSalle St., June 16, 1932; Arthur J. Goldberg, Abraham W. Brussell.

FRANCIS R. FITZSIMONS, 231 S. LaSalle St., Oct. 11, 1935; Gaylord A. Toft, Virgil V. Livingston.

JOHN P. FOX, JR., 120 S. LaSalle St., Jan. 12, 1948; Thomas N. Roupas, Milton A. Kolar.

CHRISTIAN A. GULBRANDSEN, 105 W. Adams St., Jan. 10, 1945; Dillon L. Ross, Jr., Glen E. Smith.

WAYNE M. HOFFMAN, 135 E. 11th Place, Dec. 8, 1947; John W. Freels, Harold E. Spencer.

ROBERT V. HOGAN, 175 W. Jackson Blvd., May 12, 1947; Irving Breakstone, Howard B. Bryant.

SAMUEL A. KAVATHAS, 134 N. LaSalle St., Jan. 12, 1948; Donald E. Bateman, A. Andrew Leone.

M. RICHARD LIPSCHULTZ, 105 W. Adams St., Jan. 12, 1948; H. Burton Schatz, Edmund A. Spencer.

NICHOLAS G. MANOS, 100 W. Monroe St., July 10, 1943; Archie Schinberg, Paul P. Preston.

FRANK H. MARKS, 135 S. LaSalle St., Ill., Oct. 13, 1927; D. C., 1926; Louis I. Shapiro, Leo N. Arnstein.

PAUL MORAN, 12000 S. Halsted St., Jan. 2, 1931; John A. Sbarbaro; Edward Hershenson.

ARTHUR MORSE, 10 S. LaSalle St., June 11, 1947; Thomas J. Purcell, Frank M. Padden.

JOHN B. MURNIGHAN, 111 W. Washington St., Jan. 12, 1948; Joseph Kamfner, Edwin A. Halligan.

JOHN C. PODLESAK, 2319 S. 59th Ave., Cicero, Ill., May 12, 1947; Harry D. Taft, William F. Clarke.

EMILE JOHN RAGO, 2531 W. Superior St., Jan. 5, 1948; Catherine M. Barbino, Alice Kolnick.

JOSEPH O. RUBINELLI, 519 W. North Avenue, Dec. 12, 1940; Thomas L. Underwood, Mario A. Palumbo.

ARTHUR R. SEDER, JR., 357 E. Chicago Ave., Jan. 12, 1948; John P. Lindgren, William L. Niemann.

ELMER F. SLOVACEK, 1328 W. 18th St., Jan. 12, 1948; E. Houston Harsha, Sheldon Teff.

EUCLID LOUIS TAYLOR, 188 W. Randolph St., Feb. 13, 1930; Henry C. Ferguson, Nat M. Kahn.

WILLIAM B. WOOD, 1 N. LaSalle St., Jan. 12, 1948; Matthew H. Schaenbaum, Walter Rojek.

PROPOSED LEGISLATION CONCERNING ILLINOIS UTILITIES

The task of drafting new legislation with respect to the regulation of public utilities in the State of Illinois was undertaken by the Committee on Public Utility Law of the Chicago Bar Association in November, 1940. Representatives from the Section on Public Utilities Law of the Illinois State Bar Association actively participated in this work. During the course thereof, drafts were made of two proposed bills. One is a draft of a proposed new Public Utilities Act, and the other a draft of a bill to amend the Civil Administrative Code to provide for a Department of Public Utilities. Both of the proposed bills have been approved by the Board of Managers of the Chicago Bar Association and by the Section on Public Utilities Law of the State Association.

The fundamental theory underlying the proposed bills is that the power to make orders, rules and regulations should not be exercised by the same persons who exercise the power to investigate and prosecute. At the present time, the Illinois Commerce Commission has power to act as prosecutor and judge. It has the duty to enforce "the provisions of the Constitution and statutes of this State affecting public utilities," as well as the power to file complaints on its own motion and to decide the controversy presented by its own complaint. The Committee concluded that, with adequate provision for judicial review, a divorcement of the power to investigate and prosecute from the other powers of the Commission was the most feasible solution of the problem, and would bring about a more enlightened and fair administration of the laws governing public utilities.

Two possible plans of divorcement were considered. One was the separation of functions within the Commission itself. The other was the creation of a Department of Public Utilities in the executive branch of the government charged with the duty of investigation and prosecution, and the lodgment of power to hear and decide matters in a wholly separate and independent agency. In view of the Importance of the public and private interests involved, the Committee finally concluded that a separation of functions in fact, as well as in theory, was essential, and that the second plan was more likely to bring about that result.

Department Bill

The salient provisions of the department bill are relatively brief. It provides for the creation of a Department of Public Utilities within the framework of the Civil Administrative Code. The Department will be directly responsible to the Governor, and the terms of office of its officials charged with the determination of matters of policy will expire with the term of the Governor.

The principal officers of the Department and their respective salaries are as follows: Director, $8,000; Assistant Director, $5,000; Chief of Accounts and Finance, $7,500; Chief of Engineering, $7,500; Chief of Rates and Tariffs, $7,500; Chief of Public Service, $6,000. The functions of the Director and Assistant Director are largely administrative, whereas those of the remaining officers are primarily technical in character. The latter officers will occupy positions substantially the same as those now held by corresponding officials in charge of the various bureaus operating under the Illinois Commerce Commission.

In general, the Department is given broad powers of investigation and prosecution similar to those now exercised by the Illinois Commerce Commission. Among other things, the Department will have authority to keep itself informed concerning the business and affairs of public utilities, to examine and inspect their books, property and service, to prescribe the form and contents of all reports to be filed by them, to institute proceedings before the Commission, and to seek judicial review of its orders and decisions. The Department will also have

power to confer with other regulatory agencies on public utility matters, and to protect the interests of the people of this State in proceedings before Federal officers and agencies concerning public utilities.

PUBLIC UTILITIES BILL

A. The Commission

The commission bill provides for the creation of a new Commission to be known as the Illinois Public Service Commission, which will consist of five commissioners, not more than three of whom may be members of the same political party. The commissioners will have an annual salary of $15,000, and ten-year terms, one expiring every odd-numbered year. These provisions, it is believed, will make the office of a commissioner attractive to able men; will insure, as far as legislation can insure, a tribunal independent of political pressure; and will provide for continuity in office of experienced men.

The Commission, under the proposed bill, will have a secretary and staff of examiners, but no rate experts, accountants or engineers. All examiners must be at least thirty years of age. In addition, they are required to be members of the Illinois Bar, or former examiners or assistant commissioners with the Illinois Commerce Commission who have had at least five years' experience in that capacity.

The Commission may also employ two assistant secretaries and, within such limits as to number as the Governor may approve, such stenographic and clerical help as may be necessary.

B. Procedural Provisions

Under the proposed bill, the Commission will not have power to institute any proceeding on its own motion. All proceedings must be initiated by a petition, which may be either a complaint for relief from a violation of the Act, or an application for other relief such as an application by a utility for authority to issue securities. A petition instituting a proceeding may be filed by the Department, or by any person, corporation, association, municipality, public officer or public agency.

The Commission is required under th proposed bill to deliver a copy of ever petition and tariff schedule filed with to the Department. In this manner th Department, as the representative of th whole public, will be kept informed o any proposal laid before the Commission

The proposed bill requires a hearing, o an opportunity for hearing, as a condi tion precedent to the exercise by th Commission of practically all of its reg ulatory powers. In addition, the Com mission may set any petition for hearin whenever it deems a hearing necessary Notice of all hearings must be given t the parties and to the Department. I the case relates to rates or service of utility within any municipality, notic must also be given to such municipality

The Commission is required to serve copy of all orders entered by it upo every party to the proceeding, upon al utilities bound thereby, and upon the De partment. Notice of all final order must be posted in the office of the Com mission and a copy thereof made avail able for public inspection. All fina orders must be supported by findings con cerning the subject matter and facts in quired into by the Commission.

No provision is made in the propose bill for petitions for rehearing before th Commission as is now required under th present Public Utilities Act. Instead, i provides that any party may file a peti tion for modification or vacation of an final order or decision of the Commis sion. The filing of such a petition is no required as a condition precedent to judi cial review of any final order or decisio of the Commission, but the denial there of is subject to judicial review.

Under the proposed bill, the Commis sion will have authority to grant declara tory relief. An order granting such re lief may be entered by the Commission upon petition and after opportunity fo hearing, whenever there is any contro versy or uncertainty with respect to an matter within its jurisdiction or an orde or decision of the Commission. It is be lieved that this provision, which i modeled after a similar provision in th new Federal Administrative Procedur

Act, will provide a desirable type of relief not now available under the present Public Utilities Act.

The provisions for judicial review contained in the proposed bill are somewhat broader than those found in the present Public Utilities Act. The validity of the order or decision under review must be determined on the record before the Commission, except that evidence may be presented to show (a) that the record as certified by the Commission is not a true or complete transcript of the proceedings before the Commission, (b) that the Commission failed to grant a fair and impartial hearing, and (c) that the order or decision under review has been modified or vacated by the Commission. The hearing and determination of the cause will extend to all questions of law and fact presented by the record before the court.

C. Rate Making Functions

1. Suspension of Rates

Under the present Public Utilities Act, the Commission may suspend a proposed schedule, either upon complaint or upon its own initiative without complaint, pending a hearing and decision on the merits. No showing of any kind is required, and there is no standard to control the discretion of the Commission in the exercise of its power of suspension. This situation makes it possible for the power of suspension to be exercised arbitrarily.

The proposed bill does not permit the Commission to suspend a new rate schedule on its own motion. The Commission may suspend only if it finds that there is good cause to believe that the proposed schedule would be unlawful. It may act only upon a verified petition which may be supported by accompanying affidavits. The utility is given the right to file a verified answer which may be supported by accompanying affidavits.

The proposed bill contains a further provision to meet the situation presented where a utility is seeking an increase in rates which it believes to be justified, but which the Commission, on the verified pleadings before it, finds should be suspended. In such cases, the utility may put the new schedule into effect, notwithstanding a suspension, by filing notice of its election so to do with the Commission and depositing thereafter in a bank all amounts collected by it during the period of suspension in excess of the rates theretofore in effect. The Commission is authorized to permit the utility to file a bond in lieu of making such deposits. In the event it is finally determined that the increased rates charged by the utility during the period of suspension, or any part thereof, were unlawful, the excess must be refunded by the utility. If the utility fails or refuses to make the refund, any party entitled to such refund may sue therefor in any court of competent jurisdiction.

This impounding procedure is provided for in the Uniform Public Utilities Act which was drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association. The procedure protects the customers; affords a means by which a utility willing to undertake the burden involved can protect its interests; and is designed to obviate, insofar as possible, the present practice of resorting to a court of equity for injunctive relief.

2. Temporary Rates

The present Public Utilities Act gives the Commission power to prescribe a temporary schedule of rates for a period not exceeding one year. Such rates may be prescribed if the Commission finds that the net income of the utility, after reasonable deduction for depreciation and other necessary reserves, is in excess of the amount required for a reasonable return upon the value of its property, and that a hearing to determine the issues involved in a final determination of rates will take more than 120 days. The Act also provides that if, upon final disposition of the issues, the rates finally determined are in excess of those prescribed in the temporary order, the utility shall be permitted to recoup its loss by means of a temporary rate increase for a reasonable period of time.

This method of allowing the utility to recoup a loss in the event it is finally de-

termined that the rates in the temporary schedule were insufficient is both impractical and illusory. There is no way in which the utility can compel the Commission to grant a temporary increase in rates. Nor has the utility any assurance of recoupment even though the Commission is willing to act. It is entirely possible that the temporary rates imposed by the Commission may have been confiscatory when ordered into effect, but at the time of final decision a year or several years later they may be reasonable. In such a situation, the utility is unable to recover its loss, because the Act merely provides for recovery of the difference between the revenue produced by the rates finally determined for the future and the revenue which would have been realized during the period of the temporary order if the rates prescribed for the future had been charged during that period.

Under the proposed bill, the Commission has power, after a preliminary hearing on petition, to establish a temporary schedule of rates whenever it finds that a public utility is earning more than a fair and reasonable return, and that a full hearing to determine the issues involved will require more than 120 days. In such cases, the Commission may enter an order fixing a temporary schedule of rates for a period not exceeding one year. If the public utility deems the temporary order unwarranted or too drastic, it may, notwithstanding the order fixing a temporary schedule, continue in effect its existing rates by following an impounding procedure substantially the same as that provided for in the case of rates continued in effect notwithstanding an order of suspension.

After full hearing, the Commission is required not only to fix rates for the future, but also to determine whether the rates continued in effect by the public utility during the period covered by the temporary order are lawful or unlawful. If the Commission finds that the rates were unlawful during that period, or any part thereof, it must determine the rates which would have been lawful. If it is finally determined that the rates charged during the period covered by the temporary rate order were unlawful, either for the whole period or a part thereof, the utility is required to make a refund under procedure similar to that provided for in suspension cases.

3. Rate Standards

The present Public Utilities Act contains no standard other than that of "just and reasonable" to govern the Commission in the exercise of its power over the measure of rates. The proposed bill contains a so-called rate-making rule which is modeled upon the one in the Interstate Commerce Act. The proposed rule reads as follows:

> The Commission, in the exercise of its powers under this Act to determine just and reasonable rates for public utilities, shall give due regard to the public need for adequate, efficient and reasonable service; to the effect of any existing or proposed order of the Commission upon the demand of the public for such service; and to the need of the public utility, under honest, economical and efficient management, for revenue sufficient to enable it to meet the cost of furnishing such service and to earn a fair and reasonable return upon the fair value of its utility property, or, in case of any public utility which has elected to have its rates based on the cost of its utility property as provided for in this Act, a fair and reasonable return upon such cost. In determining the proper amount of such return, the Commission shall give due consideration to the need of the public utility to attract the necessary capital for the proper continuation and expansion of its public utility business.

The efficacy of a rate-making rule depends primarily upon the consciences of the men who administer it, but it is believed that a Commission of competent and high minded members, such as the proposed bill contemplates, will give at least some heed to a rule of that character. The broad scope of judicial review presently available under the decisions of the Supreme Court of this State — the breadth of which the Committee has not attempted to restrict — will probably enable the courts to afford relief in cases where the rule has been arbitrarily disregarded to the prejudice of either the public or the utility.

Under the foregoing rule, the rate base upon which a utility is entitled to earn a

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fair and reasonable return is the fair value of its utility property, unless it has elected to have its rates based upon the cost of such property. In the event of such election, it is entitled to a fair and reasonable return upon such cost. The term "fair value" is now well known in the field of public utility regulation and has been defined in numerous court decisions. It has also been sanctioned and applied by the courts of this State in passing upon the validity of utility rates prescribed by the Commission.

The inclusion of a "cost rate base" in the proposed bill represents an endeavor by the Committee to give some recognition to the growing trend among regulatory agencies in other jurisdictions to establish rates upon original cost. In many cases, however, the use of original cost—sometimes referred to as "aboriginal cost"—is grossly unfair to the utility. The cost rate base adopted in the proposed bill seeks to overcome this difficulty.

The proposed bill provides that any public utility may adopt the original cost of its utility property, as determined by the Commission after a hearing upon petition, as the original cost of such property for rate-making purposes. In the event of such election, the utility is entitled to earn a fair and reasonable return upon an amount designated as the "cost rate base." It consists of the original cost of the utility property as determined by the Commission, after (a) appropriate allowance for working capital and for the actual cost of any additions to such property since such determination, and (b) appropriate deduction of the original cost of that portion of such property and the actual cost of that portion of any additions thereto which have ceased since such determination to be used or useful in rendering service to the public. Actual cost as applied to utility property is defined as the amount actually paid or given for such property by the utility, but does not include any amount in excess of that which would have been reasonably paid or given in an arm's length transaction.

In substance, the cost rate base represents a compromise between the original cost theory and what is sometimes referred to as the "prudent investment" theory. It combines the element of stability inherent in the use of original cost, and the element of flexibility and fairness incident to the use of prudent investment. Once a utility has elected to adopt a cost rate base, its rates are governed thereby in all subsequent rate proceedings. As a result, the consuming public is protected against improvident acquisitions of utility property and fluctuations in the level of prices, and the utility is assured of a stable rate base, which does not change with each political administration and economic cycle depending upon the exigencies of the moment.

As a further safeguard against the possibility of arbitrary action on the part of the Commission in prescribing rates for any utility which has adopted the cost rate base, the proposed bill provides that no deduction is to be made from such cost rate base for existing or accrued depreciation or amortization. In lieu thereof, the Commission is required to make a deduction from the operating expenses of such utility in an amount equivalent to interest, at a prescribed rate, on the amount then remaining in its depreciation or amortization reserve. A similar provision has recently been adopted by the public utility regulatory bodies in Missouri and Louisiana following a statewide investigation of depreciation rates and practices.

D. Indeterminate Permits

To meet the constantly recurring problem presented by the termination of short-term franchises under which many utilities operate in this State, the proposed bill provides for the issuance of indeterminate permits. Any public utility, other than a railroad or street railroad, operating under an existing franchise may file with the Commission a written declaration surrendering such franchise and re-

ceive in lieu thereof an indeterminate permit. Such permits are now provided for in the public utility laws of various states and in the Uniform Public Utility Act. In outlining the need for indeterminate permits, the drafting committee which prepared the Uniform Public Utility Act made the following statement:

> Franchises limited to short terms of years are illogical. They are unsatisfactory to utilities, investors, and consumers alike. Investments in enterprises which are limited in years of existence should be amortized in such a fashion as to return the money invested at the end of the period. Yet rates must not exceed the amount necessary to yield a fair return on the value of the utility property and they cannot be large enough to amortize the investment. Furthermore, there is no economic reason for amortizing the investment. The plant cannot be scrapped at the end of the franchise period. The public must still be served. So grantees of franchises and utility investors are forced to trust to their ability to secure renewals of the franchise at the ends of the periods. The political manipulation that attends the termination of franchises and the efforts to secure new ones, is familiar to all who have been concerned with local politics.

The proposed bill contains a further provision to alleviate any hardship which might result from the sudden termination of all franchises, and the various fees now being paid thereunder. It provides that any municipality may file a petition with the Commission requesting a determination of the amount of compensation to be paid by an utility which was obligated to make such payment under its surrendered franchise. In fixing the amount of such compensation, if any, the Commission is required to give due consideration to any expenses to such municipality by reason of the use and occupation of its public highways by the utility, and to the ability of the utility under just and reasonable rates to earn a fair and reasonable return.

E. Security Issues

A function of outstanding importance now vested in the Illinois Commerce Commission is jurisdiction over the issuance of securities by utilities. The present Public Utilities Act provides that securities issued without authority of the Commission shall be void and also provides that any security "issued with the authorization of the Commission, but not conforming in its provisions to the provisions, if any, which it is required by the order of authorization of the Commission to contain, shall be void."

Although the primary purpose of these statutory provisions is to protect the utilities — and ultimately the public served by them — against improvident issues of securities, the protection is obtained at the expense of innocent purchasers and is contrary to the philosophy of the Negotiable Instrument Law.

The proposed bill expressly provides that securities issued without the approval of the Commission shall not be void, but the public utility is subjected to liability for a fine in an amount equal to ten per cent of the amount of the issue. The court is given no discretion but must fix the penalty at ten per cent. This, it is believed, will remove any temptation on the part of the management of a utility to engage in financing without the approval of the Commission, and will give innocent purchasers the protection which it seems fair they should have.

Broadly speaking, the regulatory powers of the Commission in those portions of the proposed bill which have not been considered specifically are substantially the same as those in the present Public Utilities Act. An effort has been made, however, to improve the draftsmanship by eliminating unnecessary language, duplications and conflicting provisions, and to clarify provisions whose meaning is obscure or ambiguous. Provision has also been made for the repeal of obsolete and conflicting statutory provisions. The fundamental theory that the Commission should not have the power to investigate or the power to institute proceedings on its own motion is, however, strictly observed.

It is the belief of the Committee that the proposed bills outlined above are sound in theory and fair to both the utilities and the public.

CHICAGO BAR ASSOCIATION GLEE CLUB

"The man that hath no music in himself
Nor is not moved with concord of sweet sounds,
Is fit for treasons, stratagems, and spoils."

So many inquiries have been made as to the personnel of the Chicago Bar Association Glee Club and how it functions that the Committee on Entertainment requested that the accompanying picture and this historical sketch of the Glee Club be printed in the BAR RECORD.

The first time that the Glee Club attempted to sing its own lyrics directed to the guests of honor, and probably its first appearance, was at a dinner given by the Illinois State Bar Association to the Judges of the Supreme Court of Illinois on November 29, 1918. Almost all of the chorus were members of the Chicago Bar Association. John D. Black was leader that night and continued as leader for some time. The lyrics sung that night stand up to date as the following excerpt shows:

TREAT HIS HONOR KINDLY

Oh, treat his honor kindly
And show him due respect.
For after all he's just a judge,
So what can you expect?
And though to-night our vein is light,
The verdict we direct,
That the bar will always claim him as
a brother.

The next year a repeat performance was requested and the Glee Club again added to the gayety of the occasion with another lyric directed to the judges in which the songsters ribbed them about their easy life.

You Judges lead an easy life
You're free from every care and strife
You have no income tax nor rent to pay
Your job is pretty soft, I'll say.

By 1922 the Glee Club had become a definite part of the Chicago Bar Association dinners given in honor of dignitaries of the bar, bench and public life. Ever since that time the chorus sang to, and with, Judges, Plenipotentiaries, domestic and foreign, visiting firemen, professors and sometimes our own members.

By 1925 the Glee Club had become so popular that it decided to branch out into theatricals. In that year the first "Christmas Spirits" show was given on December 17. It was called "A Yuletide Shift in One Seance." The scene was a court room presided over by Judge Russell Whipman, then the President of the Association. The defendant was charged with defrauding complainants by some spiritual seances. The jury disagreed because the spirits were "too Volstead dry."

From that year to the present time "Christmas Spirits" shows have been an annual event, growing into a four night performance in order to accommodate the public demand. The Glee Club, now become the CBA Chorus, is the backbone of the show, mainly because it rehearses every Monday noon for an hour getting the music and histrionics in shape so that the members can be ready to help make any Association function a success. John Black is still on deck and acts as leader emeritus. His vitality, interest and suggestions have been an inspiration each year to the success of the chorus. For several years it has been under the direction of Edwin R. Ekersall who is doing a magnificent job.

Members in the picture are:

1st row: Rademacher, Parkhill, Ekersall, Black, Holloway, Stevenson and Byron.

2nd row: Davis, Swanson, LaPlante, Mahon, Yelvington, Barnard, Wright and Finks.

3rd row: Peterson, Burks, Schwab, Zimmerman, Reichelderfer, Spangenberg, Booth and Owens.

4th row: von Ammon, Hillier, Hennessey, McDermand, Chambers and Dice.

PROPERTY LAW STILL HAS TAX CONSEQUENCES - I

By Dixie M. Snively

The Federal Estate Tax Cases

It is easy to become obsessed with a subject which is as abstruse as future interests, but it is also too easily forgotten that most of law is a matter of expression, and I refer you to Judge Learned Hand's dissenting opinion in *Commissioner v. City Bank Farmers' Trust Company*,[1] where speaking, incidentally of the distinction for tax purposes between vested and contingent remainders, the judge says, "I am quite aware that this is all largely a matter of words, but so is much of the law of property, and unless we treat such formal distinction as real, that law will melt away and leave not a rack behind."[2]

It is easy to over-emphasize statements such as those made by Judge Hand, but it is also easy to forget that the entire law of taxation, both income taxation and estate taxation, is founded on the basis of taking property away from people, perhaps with due process, but at least taking away from them. And of recent years there has developed in the field of taxation, as has often been the case in other professional fields, a fad. That fad is to ignore all property concepts in dealing with income tax problems and estate tax problems. It is a tendency which was given impetus first by Mr. Justice Sutherland, by his protestations in *Klein v. United States*,[3] where he says that, "Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing, of the law of vested and contingent remainders."[4]

You will probably recall that the Court there held taxable as a gift intended to take effect in possession or enjoyment at or after death a gift in which the settlor had expressly reserved to herself a reversion in certain property which had been conveyed prior to her death.

The same judge who said that nothing was to be gained by multiplying the niceties of the arts of conveyance in *Klein v. United States*, in speaking a few years later for a divided court in *Helvering v. St. Louis Union Trust Company*,[5] held that the gift there considered was not to be regarded as a part of the decedent's gross estate, though it was contended that it was to take effect in possession or enjoyment only after death, because in that case the interest which had been reserved by the settlor was in the nature of a possibility of reverter, and was contingent upon the settlor outliving the life beneficiary.

The fact of the matter is that [illegible] these were niceties of conveyancing [illegible] the time that the settlor died from the standpoint of the value of the two interests [illegible]. And from that point of view, it is perfectly clear that the niceties of the art of conveyancing are unimportant, or should be unimportant, for estate tax purposes.

Nevertheless, in *Becker v. St. Louis Union Trust Company*,[6] decided the same day, *Helvering v. St. Louis Union Trust Company* was followed, and it was not until *Helvering v. Hallock*,[7] which we have all read and which has been the subject of as much discussion as any estate tax case that we know, that the Court decided to go back upon the rule of following the *St. Louis Union* [illegible] cases.

1 74 F. 2d 242 (C. C. A. 2d 1934)
2 Id. at 247
3 283 U.S. 231 (1931)
4 Id. at 234
5 296 U.S. 39 (1935)
6 296 U.S. 48 (1935)
7 308 U.S. 106 (1939)

Scope of the *Hallock* Case

Hallock gives the Court [illegible] not only *Hallock* [illegible] *Estate of Lucas v. Earl, Union Trust* [illegible] and the opinion was written by Mr. Justice Frankfurter. I suppose many of you have read that opinion carefully. It is full of stabs at the lawyer's property. If you read that opinion, and if you were to read no other tax case, you would be convinced that the law of property had no function whatever so far as determining the taxability of a given transfer is concerned or so far as any tax problems is concerned.

The Justice speaks contemptuously of the "recondite learning on property law." He says that the law is "full of casuistries." He refers to "subtle [illegible] which [illegible] possess no relevance for tax purposes," and he also speaks of the "[illegible]ivity fivesticks" of the law of property, and he states that these are peculiarly irrelevant in the application of tax statutes. He talks of "gossamer distinctions," and he mentions "the [illegible]osities of the [illegible] feudal law," and the whole import of the opinion is to the effect that no property law should be of any consequence in determining the taxability or non-taxability for estate tax purposes of a transfer which occurred prior to a decedent's death.

That is all very well. But it is dangerous doctrine because it has misled not only lawyers for the Bureau of Internal Revenue, but it has likewise misled a good many practitioners who are concerned with [illegible] and their taxability as a part of the gross estate of a decedent. [illegible] still a good many cases [illegible] without reference to local property law, and I don't [illegible]

[illegible] A. Randolph Pool, *Life Estates and Gift Powers* [illegible] noted to *Helvering v. Hallock*, [illegible] will find in the supplement to Mr. Pool's work, which appeared in 1946, [illegible] thirty or forty pages devoted to the many Tax Court cases which have been decided and which have attempted to interpret the implications of the *Hallock* decision. But I want to call your attention to one or two aspects of the case.

Notice in the *Hallock* case that the section of the Revenue Act which was involved was that which requires inclusion in the gross estate of a decedent of property transferred prior to his death where the gift is "intended to take effect in possession or enjoyment at or after death." Those were the words of the statute. You might argue that if property were given to A for life with the remainder to B, we will call it a remainder though it might be an executory interest, and where the gift specifically provided that the gift over was not to take effect in possession until five years after the death or until his death, or until ten years after his death, that that would be from the standpoint of the relevant section by the Internal Revenue Code, to say which was in fact "intended to take effect in possession or enjoyment at or after death."

But in a case of this kind, where the life estate which is created is vested immediately in possession or enjoyment upon the taking effect of the settlement, [illegible]

circumstance of any kind, by any stretch of the imagination, can the property revert to the settlor except possibly by inheritance from the beneficiary—that such a tax would be offensive to the Constitution, because it would be in the nature of an unapportioned direct tax.

That is ancient learning from the standpoint of tax law, but I call your attention in that connection to the court's opinion in the Second Circuit, in *Freeze* v. *Bowers*,[15] where that view is expounded at considerable length, and where, again, Learned Hand in a specially concurring opinion, demonstrates as clearly as could be done the effect of a tax of that kind from a constitutional standpoint.

Be that as it may, whether such a tax is a direct tax, or for whatever reason it may be held not to be permissible in connection with the type of gift which I have mentioned to you, the Court, in *Shukert* v. *Allen*,[16] speaking through Mr. Justice Holmes, held, where property had been trusteed by a decedent in 1921, at a time when the decedent was fifty-six years old, where the property was not to be distributed until 1951 and where the income was directed to be accumulated for the settlor's three named children and to be distributed, together with the corpus of the trust in 1951, that the property was not transferred as a gift intended to take effect in possession or enjoyment at or after death. But Mr. Justice Holmes expressly recognizes in the course of his opinion, that if the settlor thought about it at all, he certainly was pretty sure that he would be dead by the time the corpus was to be distributed.

Shukert v. *Allen* should be aligned with *Reinecke* v. *The Northern Trust Company*,[17] where five of the trusts involved were held not taxable as a part of the beneficiary's gross estate by a unanimous court writing through Mr. Justice Stone. In that case, life estates were given to certain beneficiaries, and the property was to be distributable not until, at the earliest, five years after the decedent's death.

There we have a case falling squarely within the actual provision of the relevant section of the Revenue Code, although that gift was in fact without question intended to take effect after the decedent's death; the Court held that it would not be taxable as a part of the decedent's estate.

I am reviewing those cases very briefly simply to establish the fact that merely because property is trusteed upon terms where future interests will not take effect in possession until the death of the settlor, or until after his death, the Court has never taken the position that property so trusteed, unless there is some possibility of reverter or residual interest left in the settlor, is taxable as a part of his gross estate. And so far as these residual interests are concerned, it seems clear enough from *Shukert* v. *Allen* and from *Reinecke* v. *The Northern Trust Company*, that they must be interests which arise out of the instrument of gift itself, or which are undisposed of by the instrument of the gift, so that they may come back to the settlor as a result of the failure of the trust, for one reason or another, and not because the settlor may by some remote chance inherit the interests back under the descent statutes from the beneficiary of the trust.

Commissioner v. *Spiegel's Estate*

There is no case prior to the decision of the Seventh Circuit in *Commissioner* v. *Spiegel's Estate*[18] which takes a position so extreme as that to which I have referred. I am going to spend some considerable time on the *Spiegel* case, because it is illustrative of the problem here considered, and also because it is important to Illinois lawyers, because it purports to tell you what the Illinois law is.

In the *Spiegel* case, the settlor had created property during his lifetime

15. 75 F. 2d 625 (C.C.A. 2d 1926).
16. 273 U.S. 545 (1927).
17. 278 U.S. 339 (1929).
18. 159 F. 2d 257 (C.C.A. 7th 1947).

following terms, and I will read to you from the instrument of the gift:

"I, the Trustees and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom" and shall during my life "divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of each of my three (3) children," (naming them) "such income to be distributed at convenient intervals each year. In the event that any of my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been entitled, shall go to the child or children of such deceased child of mine in equal parts, and if there be no such child or children . . . such income shall be divided equally among" my surviving children.

He goes on to say: "Upon my death the said Trustees . . . shall divide" the trusteed estate, "and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children and the descendants of any deceased child of mine per stirpes and not per capita."

In other terms a gift of the income from the trusteed property to the settlor's children for life, with a substitutionary gift of the income to the issue of any children who die leaving children during the term of the trust, and if any die without leaving children, his share of the income shall go to the survivors. Then follows the gift of the corpus to vest at the death of the settlor as a gift to the settlor's three named children, and in case any of them have died leaving children, to such children, and if any of them have died without children, it is to go to the remaining ones who are living at the settlor's death. It is a relatively simple gift, though it may not sound so from reading it rapidly.

The only real issue in the case was whether the property which was trusteed could return to the settlor by reason of his having failed to dispose of the property wholly or by the terms of the trust instrument. The second possibility can be wholly eliminated, because it is clear from the gift that there is no provision of any kind providing for the return of the property to settlor under any circumstances whatever. So, in order that the tax might properly be exacted, it would have to be held there was some possibility of reverter, some resulting trust, or some other residual interest remaining outstanding in the settlor at the time the gift was made, and that it could return to him upon the ending of all the contingencies prior to his own decease.

"I think that I can show you that under the Illinois property decisions the property could not return to the settlor under any circumstances, and that as a result, the holding of the court, reversing the Tax Court, to the effect that the estate tax had properly been assessed, was, I think, an erroneous holding.

I want to read one or two remarks from the Court's decision. The court states, after referring to the *Klein* case and to *Helvering* v. *Hallock*, that, "Applying this law to the instant case, we think it follows that the interests under this trust did not vest upon the execution of the trust, as contended by the taxpayer, and could only vest upon the happening of the condition precedent, namely, that the beneficiaries or some of them survive the settlor, and this was the event which brought the interests into being for the beneficiaries. If none of the beneficiaries sur-

vived the settlor, and that was a possibility, then the trust failed, and the trustees would hold the bare, naked title to the corpus as trustees for the settlor.[19]

The court arresting its decision on the possibility that somehow under the terms of this instrument the property could return to the settlor. That depends, as I have said, on the applicable local property law, and I think it can be best illustrated by reference to some of the early English decisions.

The issue in this case was whether these gifts over—whether the actual taking effect in possession of these gifts over—for which provision was made in this trust instrument—was a part of the contingency upon which the interests of the beneficiaries of this trust were to be or not to be divested.

Relevant Property Decisions

I think I can best illustrate it by reference to the famous Irish case, *O'Mahoney v. Burdett*.[20] That case is simplified to its bare bones as follows: To *A* for life, remainder to *B*, and if *B* should die unmarried or without children, then the property bequeathed was to go to *C*. *B* married and dies without children, and meanwhile, *C*, who is to take the gift over, has predeceased the testator, and the gift has lapsed. One of the issues in the case is whether, since the property was to go over to *C* upon the death of *B* unmarried or without children, *B's* interest was divested, the gift to *C* having lapsed. Does it go to *B's* husband as her personal representative, or does it pass under the residuary clause of the will?

In other words, is it necessary for the gift over from *B* to *C* actually to take effect, in order that *B's* interest shall be divested? Or is it enough that there is a divesting contingency, namely, the death of *B* without children, which has in fact occurred, but which cannot throw the property over to the person who is named to take it, because that person has predeceased the testator?

In that case the court held that *B's* interest was divested, even though *C*, who was to take it upon the happening of the divesting contingency, was dead and wasn't there to take it.

But the *O'Mahoney* case is not consistent with a good many of the other English cases; it is not consistent with the majority of American decisions, and it is wholly inconsistent with the Illinois cases which have passed upon the same problem. I will mention to you, without going into detail, the English authorities on the point. The best known is *Doe d. Bowden v. Eyre*,[21] Elsewhere also *Robinson v. Wood*,[22] *Hayes v. Hurst*,[23] and the latest case is *Re Bold*,[24] decided in 1926. All of those cases follow the same view which was taken in the *O'Mahoney* case, namely, that the taking effect of the gift over is not a part of the divesting contingency. In other words, if the contingency upon which the property is to go over has occurred, under the authorities which I have mentioned, it makes no difference at all whether the gift over can actually take effect, and the prior gift does not become absolute because of the failure of the gift over to take effect.

On the other side are several also well known English cases; *Harrison v. Foreman*,[25] *Jackson v. Noble*,[26] and *Jones v. Davies*,[27] decided by Sir George Jessel when he was Master of the Rolls. There have been attempts among the English authorities to distinguish these conflicting lines of authority on the basis that the reason for the failure of the gift over may make a difference as to whether or not the prior gift should become absolute or should fail. Those distinctions, for the most part, in my opinion have been un-

19 Id. at 259.
20 L.R. 7 Eng. & Ir. App. Cas. 388 (1874).
21 5 C.B. 718, 136 Eng. Repr. 1058 (1848).
22 27 L.J. Ch. (N.S.) 726 (1858).
23 51 L.J. Ch. (N.S.) 729 (1882).
24 95 L.J. Ch. (N.S.) 201 (1926).
25 5 Ves. J. 207, 31 Eng. Repr. 549 (1800).
26 2 Keen 590, 48 Eng. Repr. 765 (1838).
27 28 W.R. 455 (1880).

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successful. I do not belive that you can reconcile the conflicting English decisions on any rational basis, and I might refer to Mr. Jarman's statement, since he states it about as succinctly as it is possible to state it: "As a devise expressly made to take effect on a contingency will not arise unless such contingency happen, it follows *a fortiori* that an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted devise happen. . . . Thus, if a devise be made to A, to be divested on a given event in favour of persons unborn or unascertained, it will not be affected by the happening of the event described, unless, also, the object of the substituted gift come *in esse*, and answer the qualification which the testator has annexed thereto."[28]

I want to relate those principles, if they may be called that, to the *Spiegel* case. Remember the gift in the *Spiegel* case, and we are concerned not with the gift of income, but with the gift of the corpus. The gift of the corpus was to the settlor's three named children, and if any of them should die leaving a child or children, the property was to go to such child or children. Now, let us suppose that one of them died, leaving a child or children. That child or children would take, immediately upon the death of the deceased child, a vested interest in the corpus of the trust, and that interest could never be taken away from it, whether the settlor lived or died, or whether it predeceased the settlor or overlived him.

The next question, then, is the effect of the second gift over, that if any of the children die without leaving a child or children, the corpus is to go to the remaining child or children. And the notion which the court seems to entertain is if the first child—we will call them *A*, *B*, and *C*—if *A* should die during the lifetime of the settlor without leaving a child or children, and then the second child should die under the same circumstances, and then the third child, that the divesting contingency, namely, the death of the child without leaving a child or children would have occurred and since there was nobody to take the property at the death of the settlor, it would result back to the settlor.

Status of the Illinois Decisions

The Illinois cases do not support that position. The fact is, that if the child *A* died without leaving a child or children and then *B*, and then *C*, under similar circumstances, and there was nobody to take the corpus, under our cases, the corpus would not have been divested, because the gift over could never take effect. That is to say that the taking effect of the gift over, under the Illinois decisions is actually a part of the divesting contingency and if events occur so that the gift over can't take effect, the prior gift will not be divested. I can illustrate that best by reference to some of the Illinois decisions on the point. I refer first to *Knight* v. *Pottgieser*,[29] where Pottgieser had devised to his well-beloved wife Barbara for life followed by a gift in remainder to his children or their descendants in equal shares the descendant or descendants of a deceased child to take the parent's share. Notice it is a gift to *A* for life, remainder to the testator's children, or the descendants of any deceased child of the testator.

The testator's son died after he died but before the widow. He died intestate and he left no descendants, and his widow—not the testator's widow—claimed a half of the property by descent, and the other children claimed that the remainder of the children of the testator was contingent on survivorship of the life estate and if not, that it was vested to be divested by the death of any child, whether with or without descendants prior to the death of the tenant for life.

The court held for the widow of the deceased son, and in so holding, it went further than it had to. It said that the gift

28 2 Jarman, Wills (7th ed., 1930) 1339-1340.

29 176 Ill. 368, 52 N.E. 934 (1898).

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in remainder was indefeasibly vested at the death of the testator, and so the case cannot be regarded in and of itself as authority on the point now being discussed. But in two subsequent cases, *Warrington* v. *Chester*,[30] and *Smith* v. *Shephard*,[31] *Knight* v. *Pottgieser* was interpreted by the court, and in those cases the court said that the Knight case went further than was necessary for a decision of the particular issues there involved; that the remainder was one which was vested at the death of the testator to be divested by the death of any of the children, but only to be divested should a child die leaving descendants. So that upon a gift to A for life, remainder to his children, and in case of the death of any, then to the descendants of a deceased child, the remainder is vested, and it makes no difference so far as the vesting of the remainder is concerned if the remainderman dies before the life tenant provided that he doesn't leave descendants surviving him. If he leaves descendants surviving him, the remainder is divested and goes to those descendants; but if he leaves nobody to take it, then the gift becomes absolute, and that is the issue in the *Spiegel* case.

Go back again to the gift in the *Spiegel* case; the income to the children for life, and upon the death of the settlor, then the corpus to be divided between the three children, naming them, and if one of them dies leaving children, then to such children, and if one dies without children, then to the remaining children of the settlor. On the basis of *Knight* v. *Pottgieser*, as interpreted by the two later cases, if there are no survivors to take the gift, the prior gift cannot be divested, and it passes to the heirs or the next of kin of the primary beneficiaries.

In that connection, the Seventh Circuit totally ignores *Continental Bank* v. *Kane*,[32] and I want to read you the terms of the gift there. The gift there was a residuary gift of property trusteed by a prior clause of the will, which provided for the payment of certain annuities to certain named beneficiaries, and upon the death of the last surviving annuitant, the property which was trusteed was to be divided in specified proportions among five named persons, and in case of the death of any of those persons prior to the ending of the trust, the property trusteed was to be divided among the survivor or survivors.

All of these people predeceased the ending of the trust, and it was contended on the one hand by the trustee that the property became intestate, that the divesting contingency had occurred, because they had died before the trust ended, and it was contended by the next of kin of these beneficiaries on the other hand, that the divesting contingency had not occurred and could not occur, because there was nobody there to take the property, and that it passed to them as the next of kin of the beneficiaries. And the court held against the trustee, and for the next of kin of the beneficiaries, and it states without equivocation that the contingency "which would divest the interest . . . has not *and cannot happen* . . . ."[33] and it could not happen because there was nobody there to take it.

And that is the position which is taken in the Illinois cases, and for that reason, I feel satisfied that in a case like the *Spiegel* case there was no residual interest which could ever go back to the settlor of the trust. There being no residual interest which could go back to the settlor of the trust in that case, if you relate the *Kane* case to the *Spiegel* case, you will see that if, as the court says, all of the beneficiaries including the descendants of the primary beneficiaries, should predecease the settlor, that the property could not go back to the settlor simply because there was nobody to take it under the terms of the trust. The original interests of those beneficiaries were vested, the divesting contingency has not occurred because the gifts over could

30 294 Ill 524, 128 N E 549 (1920)
31 370 Ill 491, 19 N E 2d 368 (1939)
32 308 Ill App 110, 31 N E 2d 351 (1941)

33 308 Ill App at 124, 31 N E 2d at 357 (italics supplied)

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take effect, and consequently, as in the *Kane* case, the property would have descended to the next of kin of the three children or their descendants, as the case might be, depending upon who were the beneficiaries at the time that the trust ended.

Conclusions

I want to call your attention in that connection, to two or three portions of the opinion in *Commissioner v. Spiegel's Estate* which demonstrate that the court was of the opinion that these interests could result back to the settlor, and that the court was not taking the position that the mere fact that the settlor might happen to be the next of kin of one of the beneficiaries at the time that he died, would justify the exaction of the tax. The court says that, "If all of the beneficiaries of the settlor were dead at the time the settlor dies, and that was a possibility, the trust would fail."[34]

Well, it wouldn't fail under *Continental Bank v. Kane* nor under the other cases, because the interests of those beneficiaries would go to their next of kin, and not back to the settlor. The court goes on and says, "Thus there was a property interest remaining in the settlor that was terminated only by his death, and this was a sufficient interest for the estate tax to attach, pursuant to Section 811 (c)."[35] There was no property interest.

The court then says that, "In the instant case the condition upon which the beneficiaries take the corpus is that they survive the settlor."[36] They don't have to survive the settlor, except in so far as the interest might be divested in favor of their own descendants, but only to that extent, and if it was divested in favor of their own descendants, those descendants would take vested interests.

There are a couple of other remarks in the opinion: "This possibility that the property might return to the settlor was sufficient upon which to fasten the estate provisions. That the property might ret to the settlor by the operation of law rat than by the terms of the instrument, is no significance."[37]

Let us concede that it is of no sign cance that it might return by operat of law rather than by the terms of instrument. The cases from Illinois, property cases, demonstrate conclusively think, that the property could not ret either by the terms of the instrument or operation of law. The only way that could return to the settlor was by vir of the possibility that he might at the de of all of the beneficiaries, inherit fr them under the laws of intestate succes a thing which he might do just as ea if he gave the property directly and o right to his children, and they predeceas him. He then conceivably might be th heir or next of kin, and only to that tent could the settlor, under the Illi cases, in the *Spiegel* case, have gotten t property back.

These things that I have been discuss may be subtle casuistries, and the cases m involve "gossamer distinctions," but I s mit to you that there is nothing gossa about the $1,140,606.30 which is to added to Mr. Spiegel's estate if the S preme Court doesn't see fit to reverse Seventh Circuit. And though I cont that the executor and the beneficiaries this estate may be fully justified in garding as quite "unwitty" the assessm of some $451,000.00 in additional tax it seems to me that this case and the pr erty issues which it involves, demonstr that property law still does have some consequences.

34. 159 F. 2d at 258.
35. Id. at 258-259.
36. Id. at 259.
37. Ibid.

EDITORS' NOTE: The foregoing text of a lecture delivered at a lunch meeting of the Chicago Bar Associ held on September 29, 1947 under the a pices of the Committee on Trust Law

AMENDING THE REVENUE ARTICLE OF THE ILLINOIS CONSTITUTION

By Walter J. Cummings, Jr.

One of the most criticized provisions of the Illinois Constitution is Article IX dealing with Revenue. Sections 1 and 2 of this Article specify the kinds of taxes which may be levied. They provide as follows:

> Sec. 1. The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time direct by general law, uniform as to the class upon which it operates.
>
> Sec. 2. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this constitution.

These sections are presently construed to permit only three types of tax, namely, (1) property, (2) occupation, and (3) franchise and privilege.[1]

The general property tax, authorized by the first clause of Section 1, must be imposed on all property and in proportion to its value. To satisfy the latter requirement, the rate may not be graduated.[2]

The occupation and franchise and privilege taxes authorized by the second clause of Section 1 and by Section 2 need only be uniform as to the class upon which they operate. Uniformity as to these taxes means only that the classification be reasonable.[3] Graduated rates are not proscribed.[4]

County taxes are governed by the principles of Sections 1 and 2, for county taxes may only be levied under legislative authorization.[5] The same uniformity rules are likewise applicable to taxes of the more local governments.[6]

Illinois is supposedly one of the five remaining states whose constitutions require that when a property tax is imposed, *all* property must be assessed and taxed at the same rate.[7] In other words, in such jurisdictions, classification of property under a property tax is not constitutionally permissible.

Until recently, often repeated dicta of the Illinois Supreme Court in interpreting the Revenue Article made it appear that whenever a property tax was levied, prop-

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1 *People* v. *Barrett*, 373 Ill. 393 (1940); *Riet* v. *Barrett*, 355 Ill. 104 (1934); *Bachrach* v. *Nelson*, 349 Ill. 579 (1932).

2 *Bachrach* v. *Nelson*, 349 Ill. 579 (1932) invalidated a graduated income tax because it was "a tax on *property* by graduation other than by valuation."

3 See "The Illinois Constitutional Requirement of Uniformity in Taxation," 33 Ill. L. Rev. 57, 79-87 (1938).

4 The graduated State Inheritance Tax was upheld in *Kochersperger* v. *Drake*, 167 Ill. 122 (1897). The tax was sustained on the grounds that it was a privilege tax (upon the "right" to succeed to property) and the rule of uniformity as to class was not violated because the classifications prescribed were reasonable.

5 *Kocsis* v. *Chicago Park District*, 362 Ill. 24, 41 (1935); *People* v. *Chicago & E. I. R. Co.*, 305 Ill. 434, 458 (1922).

6 Sections 9 and 10 of Article IX require that local taxes shall be "uniform in respect to persons and property." *Inter alia*, these Sections require that local property taxes be in proportion to the value of the property assessed. *Sherlock* v. *Village of Winnetka*, 68 Ill. 530, 535 (1873); *Anderson* v. *City of Park Ridge*, 396 Ill. 235, 244 (1947).

7 Sears, "Constitutional Revision and Party Circle Bills," 14 Univ. Chicago L. Rev. 200, 207, note 39 (1947).

etc. could not be classified.[8] However, a 1941 opinion of the Illinois Supreme Court contained a strong dictum that "The Constitution does not prohibit a classification of property and taxpayers."[9] Although three Justices dissented from that opinion, the dictum has been approved in several successive decisions.[10] If the dictum should become law, the Legislature could of course authorize different tax rates and different methods of assessment to be imposed on such varied classes of "property" as real property, tangible personal property, intangible personal property, net income, etc. Nevertheless, the *ad valorem* requirement of the first clause of Section 1 might still prevent a graduated property tax from being imposed on any classes.[11] Because of the provisions of Section 3 of Article IX prohibiting the exemption of any but specifically named property and because Section 1, by its terms, contemplates that all property be taxed, at least a nominal tax would have to be placed on all classes of property not included in Section 3 if a scheme of legislature classification were enacted without constitutional change.

General Property Tax on Real Estate

Since the statistics are more readily available, the following discussion will be directed to the general property tax on Cook County real estate. However, it is believed that the state-wide picture is much the same.

In 1943, for the first time in a great many years, the assessing officials of Cook County purported to commence assessing Cook County real property at its fair cash value, as contemplated by the Constitution and statutes. Previously real property in Cook County had been assessed at 37 per cent or less, while the Department of Revenue of Illinois (or its predecessors) and the various counties used widely varying assessment bases, causing discrimination and confusion.

The Department of Revenue of Illinois is legally charged with assessing railroads and capital stock of certain corporations, and county taxes are levied on such assessment. Under an interpretation of the State Constitution by the Supreme Court of Illinois, the Department also must equalize its assessments in accordance with a state-wide average assessment ratio.[12] As a result of the Cook County Assessor's action in adopting full value, the State-wide ratio employed by the Department was forced up from 33 per cent in 1942 to 54 per cent in 1943, so that the equalized State assessments for railroads and capital stock were greatly increased.[13] Accordingly, the railroads and also those companies which are subject to capital stock assessment by the Department of Revenue were subjected to a higher state assessment for county taxes than previously. Inasmuch as real property subject to Cook County assessment was assessed at fair cash value instead of at 54 per cent, there was discrimination against such locally assessed property as compared with Department assessed property. On the other hand, inasmuch as the assessment ratios in almost all other counties were substantially less than 54 per cent (e.g. 21 per cent in Lake County), there was discrimination in

8. *People v. Grand Trunk R. R.*, 357 Ill. 493, 498 (1934); *First National Bank of Urbana v. Holmes*, 246 Ill. 362, 369 (1910); *C. B. & Q. R. R. Co. v. Aurora*, 99 Ill. 205, 212 (1881); cf. *Primm v. City of Belleville*, 59 Ill. 142 (1871).

9. *People v. Southwestern Bell Telephone Co.*, 377 Ill. 303, 307 (1941).

10. *People v. Allyn*, 393 Ill. 154, 160 (1946); *Routt v. Barrett*, 396 Ill. 322, 341 (1947); see also *People v. Olympia Fields Country Club*, 374 Ill. 10 (1940); *Mobile & Ohio Railroad v. State Tax Commission*, 374 Ill. 75 (1940); *The Hub v. Hanberg*, 211 Ill. 43 (1904).

11. The *ad valorem* principle of *Bachrach v. Nelson*, 349 Ill. 579 (1932) was recently approved in *People v. Union Electric Power Co.* 392 Ill. 271, 284 (1946).

12. *Mobile & Ohio Railroad Company v. State Tax Commission*, 374 Ill. 75 (1940).

13. First and Second Annual Reports of the Department of Revenue, p. 48.

such counties against Department assessed property as compared with locally assessed property.

To end the discrimination caused by two varying assessment ratios of state and county, the Legislature passed legislation in 1945 empowering the Department of Revenue to determine the multiplication factor to be applied to the aggregate assessment fixed by the local assessment officers in order to produce a ratio of assessed to full fair cash value equivalent to 100 per cent. The counties are required to use this basis in extending their taxes. In turn, the Department uses full value in making its assessments. The legislative intent was that all property in Illinois be assessed at 100 per cent before the levy of taxes.[14]

As a result of administrative and legislative improvements, discrimination in Cook County assessments of real estate within each class has been greatly lessened. However, the discrimination between classes of real estate continues. Legislative classification, discussed *infra*, might relieve this situation and also serve to reduce real estate assessment litigation. Real estate pays proportionately much higher taxes than personal property, except tangible personal property of corporations, which is assessed at approximately the same ratio of full value as real estate. For example, although Cook County realty is said to be worth only 40 per cent of the taxable property there and Cook County personalty 60 per cent,[15] in 1946 Cook County real estate was assessed at $7,167,581,889 and paid taxes of $175,154,808.96, whereas all personalty, tangible and intangible, was assessed at $1,895,188,97[16] and paid taxes of $41,911,319.01.[16]

One theoretical way to lessen the disproportionate tax burden on real estate would be to increase the burden on intangible personal property. As will be pointed out in the next section of this paper, it would seem to be impractical to derive further revenue from personalty without legislative classification. Under recent, repeated dicta of the Illinois Supreme Court,[17] it is possible that legislative classification can be achieved without constitutional amendment of the Revenue Article; otherwise, in an endeavor to distribute the property tax burden more equitably, the Revenue Article should be amended to permit classification.

General Property Tax on Intangible Personalty[18]

For years there have been no attempts in Illinois to assess intangibles at full value. Instead, the assessing officials have adopted the philosophy of the United States Supreme Court, which stated that "a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaption of property to its burdens." *Pacific Express Company v. Seibert*, 142 U. S. 339,351 (1892).

Because intangibles are easily concealed and because full value assessment on intangibles would result in confiscatory taxation and drive such property out of the

14. For a complete description of this ameliorative legislation, see *Anderson v. City of Park Ridge*, 396 Ill 235 (1947); Brasee, "State Taxation," 36 Ill. Bar J 11.

15. See "Taxation of Intangibles in Illinois," 35 Ill. L. Rev. 716, 724, note 52 (1941). As shown there, intangibles are still not assessed at 40 per cent, even after the Department of Revenue applies its equalization multiplier.

16. These assessed values reflect the multiplier applied by the Department of Revenue to the county assessments in order to obtain full value assessment.

17. See notes 9 and 10, *supra*.

18. The following discussion is oriented primarily to the situation in Cook County, but the situation there is quite typical of that elsewhere in Illinois.

state,[19] the Cook County Assessor has administratively classified intangibles at much lower percentages of value than other taxable property, so that intangibles are taxed at a much lower effective rate. For example, cash and bank deposits are only assessed at 4 per cent and stocks and bonds at 10 per cent of face or market value, or at two times the annual earnings, whichever is lower, no intangible being presumed to earn less than 2 per cent.

As a result of assessing intangibles at lower rates, commencing in 1931, more returns were filed so that the assessed valuation of intangibles jumped ten times in that year. The assessed value doubled again in 1937 when the Federal income tax returns became available to the Assessor.[20]

Through administrative classification, more intangibles have been reached. However, under the present system of administrative classification, Cook County intangibles were assessed at only $19,085,648 in 1946 (before applying the 1.59 equalization multiplier for 1946 of the Illinois Department of Revenue).[21] Since intangibles are reported at the rate of 10 per cent of face value on the average, the intangibles reported represented $190,856,480, which is one of the highest amounts ever reported but still absurdly low as compared with the real worth of Cook County intangibles.[22] The property tax receipts from intangibles in Cook County in 1946 were only $667,616.96, as compared with $445,911,319 from all personalty (including intangibles) and $175,154,808.96 from realty. These figures conclusively demonstrate the unworkability of the present system for taxing intangibles. As one authority has said, the present taxing of intangibles in Illinois "becomes a tax on honesty and offers a bonus for successful dishonesty * * * all the lawbreakers under prohibition would scarcely make a frog-pool in Lake Michigan compared to the number of lawbreakers developed under the present personal property taxes in Illinois."[23]

Not only has the administrative classification of intangibles failed to produce substantial tax receipts, but it also violates authoritative judicial statements that the Illinois Constitution forbids classification.[24] Taxpayers can hardly be expected to comply with administrative measures of doubtful legality. Surely an administrative classification which disregards statute and Constitution is ethically indefensible. Moreover, although the administrative assessment rules for intangibles may now be fair, the danger inherent in administrative classification is that these rules may be unjustly changed at will. If the general

19. See "The Constitution of Illinois" (Legislative Reference Bureau, 1934) pp. 36-37; Altman, "Taxation of Intangibles in Chicago," 33 Ill. L. Rev. 623, 624 (1939).

20. See *Illinois Tax Problems* (Illinois Tax Commission, 1940) p. 45. The County Assessor no longer checks with the Federal income tax returns since extra copies are not currently available in Chicago.

21. This 1.59 multiplier makes no attempt to bring the locally assessed value of intangibles up to 100 per cent. Instead, this multiplier is based on real estate valuation (primarily from sales records) in Cook County, as compared with the local assessor's valuation of real estate.

A taxpayer might successfully challenge the automatic application to his personal property of a multiplier based solely on real estate statistics. If, for example, an automobile has already been returned at its fair value, the application of a "real estate" multiplier thereto by the Department of Revenue would seem manifestly arbitrary and unreasonable.

22. In 1942, the full assessed value of moneys alone in Illinois was but a quarter of one per cent of the six billion dollars in individual bank deposits in the State. "A Constitutional Convention for Illinois" (pamphlet issued by League of Women Voters of Illinois), p. 5. See also note 15, *supra*.

23. Simpson, *Tax Racket and Tax Reform in Chicago*, (1939) p. 227. The present personal property tax system was also condemned by some of those attending the December, 1945 Chicago conference of the Illinois States Attorneys Association.

24. See note 8, *supra*. The assessing officials believe that under the Constitution and statutes full value assessments are required. See Clark, "Crazy Quilt Tax Assessment Hodge Podge in the State of Illinois" (1945) pp. 4-5; Illinois Assessor's Manual (1944) pp. 51-150.

property tax is not to be abandoned,[25] what is the solution?

It is submitted that a system of legislative classification of property should be tried even though constitutional amendment might be required.[26] Besides permitting legislative classification of property, the amendment could be phrased to authorize the exemption of a certain amount of ordinary personal belongings and furniture. In view of Sections 1 and 3 of Article IX, the present administrative exemption in Cook County of furniture to the extent of $400 seems clearly unconstitutional. In order to forestall future litigation, the amendment should make it plain whether or not graduated rates are to be permitted. All tangible personalty should not be exempted since such property furnishes a substantial, fair source of revenue, and besides it is often difficult to distinguish legally between real and personal property.

An amendment permitting legislative classification of property would enable the Legislature to experiment with various types of property classification to determine whether the general property tax could be made fairer and more workable. Legislative classification would prevent local assessing officials from making unreasonable administrative classifications. It would, also, preclude delinquent taxpayers from relying on the alleged illegality of administrative classification. Enforcement campaigns would then be buttressed by law and could, therefore, be waged more successfully. Legislative classification might reduce the congestion of the courts which review personal property assessments. Finally, the assessed value of intangibles and attendant revenue yield would be greatly increased according to the results achieved in states permitting a classified property tax,[27] so that the present untoward burden on real estate could be lessened.

The following criticism by Professor Kenneth C. Sears applies particularly to the existing method of taxing personal property:

> Article IX causes unnecessary perjury, discrimination, and much social confusion and frustration. Furthermore, the main reason that we manage to tolerate this Article is that officials do not faithfully comply with its requirements. The Article is a blight on progress and an unfortunate reflection of our lack of first rate political intelligence.[28]

Conscious of the need for reform, in 1916 the voters of Illinois voiced approval of a proposed amendment which would have permitted classification of personal property, by a vote of 656,298 to 295,792.[29] The amendment failed only because it lacked the affirmative majority *of all votes cast at the election*, as required by the archaic amending clause of the Constitution. If an amendment of this type, explicitly stating that income taxes were not thereby being authorized, were submitted to the voters after an educational and promotional drive, it should have a real chance of adoption. Unless the Supreme Court of Illinois should in the meantime sustain legislative classification, every effort should be made to secure an amendment permitting it. Such an amendment should be welcomed by the citizens of Illinois, as a definite means of combatting the widespread practice of filing perjured returns which makes a mockery of our revenue system.

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25 For criticism of the general property tax see Manchester, *Taxation in Illinois* (1922) pp. 23-31; Simpson, *Tax Racket and Tax Relief in Chicago* (1939), pp. 225-236, 239-250, 51.

26 As already pointed out in recent opinions the Supreme Court of Illinois has said that the Illinois Constitution does not prevent classification (see notes 9 and 10, *supra*). Accordingly, a constitutional amendment may be unnecessary.

27 "The Constitution of Illinois" (Legislative Reference Bureau, 1934), p. 39.

28 Sears, "Constitutional Revision and Party Circle Bills," 14 Univ. Chicago L. Rev. 200, 207 (1947).

29 Sears, "Constitutional Revision in Illinois," 33 Ill. L. Rev. 2, 7 (1938).

Some Possible Amendments to the Revenue Article

As shown above, assuming the Supreme Court will not in the future permit legislative classification of property, Article IX of the Constitution should be amended in that respect. The following amendments of Article IX should also be considered:

1. Instead of spelling out exemptions as in Section 3, that matter might well be relegated to the Legislature. At least, besides the existing constitutional exemptions, the exemption of household property and ordinary personal belongings up to a certain value should be permitted, if only to legalize the existing unconstitutional administrative practice. The amendment could authorize other exemptions in case an income tax or a privilege or occupation tax measured by net income eventually is authorized.

2. Section 12 prohibits local governments from becoming indebted to an amount exceeding 5 per cent of the last assessed value of the taxable property therein. This provision has been evaded by the creation of 429 unwieldy and costly municipalities in Cook County alone and more than 15,000 taxing bodies in the State, which is one-tenth of all the taxing bodies in the United States. By amendment, the Legislature might be empowered to fix the debt limitation, or the people of the local government by a majority of votes cast upon the question. It has been suggested that the rate be increased to 7 per cent of the assessed value of tangible property,[30] but that suggestion was made in 1939, prior to the tremendous increase in assessed values resulting from the assessment of property at 100 per cent instead of a fraction thereof. At present, virtually every taxing body has a large unused margin of bonding power.

3. Under interpretations of Section 12, local governments can only pay bond issues out of property taxes. Section 12 might be amended to permit the payment of debt interest and principal out of other sources of revenue as well.

4. Shorten the two-year right of real estate redemption from sales for the non-payment of taxes, as contained in Section 5, so that tax purchasers will be assured of "title" earlier. Thus it might be possible to secure somewhat fairer prices at tax sales. The two-year period also applies to foreclosure sales of property forfeited to the State through lack of purchasers at the original annual tax sale by the county collector. Different periods might be provided for the two types of sale. In order to clarify any doubts, the two periods should be stated to be non-cumulative. Probably the amendment should leave to the Legislature the whole subject of tax sales now covered in Sections 4 and 5.

5. Remove the restrictions as to notice found in Section 5 so that tax deeds may issue on terms fixed by the Legislature.

6. Authority for the State to commute local taxes by substituting therefor a state tax is favored by some tax experts. This would cover *Raymond* v. *Hartford Fire Insurance Co.*, 196 Ill. 329 (1902), which invalidated a statute imposing a tax on foreign life insurance companies measured by a percentage of gross Illinois premiums as violating Sections 9 and 10, because the statute attempted to exempt the companies from city taxes on personal property.

7. Some persons favor permitting local governments to be allowed to adopt such system of assessing and levying taxes as the voters thereof might approve by a certain percentage of votes cast upon the question. At present, local governments must comply with the *ad valorem*, uniformity and exemption restrictions of Sections 1, 3, 9 and 10 of Article IX. If an amendment of this type is ever drafted, appropriate safeguards should be included.

Income Tax

The general property tax provision of our 1818 Constitution was retained the

30. *Illinois Tax Problems* (Illinois Tax Commission, 1940) p. 342

1870 Constitution as a means of taxation according to ability to pay, for at that time the wealth of the State still consisted chiefly of realty and tangible personal property. Now intangibles comprise a tremendous source of wealth. Wages and salaries are believed to account for 60 per cent of the present net income of the population of Illinois, and interest and dividends for 16 per cent thereof.[31] As shown, it has thus far proved impossible to apportion to intangibles and other personalty their fair share of general property taxes. Judge Cooley has epitomized the difficulty of taxing personalty as follows:

> Taxation of personal property has never been a success. It is subject to the following very important objections:
>
> (1) It cannot be assessed without inquisitorial process of some kind, instituted for the purpose of ascertaining that which is not open to public inspection and which the individual, except under the compulsion of such process, would not consent to disclose.
>
> . . . . .
>
> (2) The assessment of personalty holds out constant and very powerful temptations to defraud the state by concealing the knowledge of everything which the taxpayer believes cannot easily be discovered. This is so well understood that it is scarcely expected that citizens will voluntarily state what they possess or that officers will make much if any effort to discover. Indeed, the assessment of personal property reaches so small a proportion of the amount really protected by government, that it might almost be said that laws for the purpose remain on the statute books rather as incentive to evasion and fraud in the dealings of the citizens with the state than as a means of realizing a revenue for public purposes.[32]

Nevertheless, local taxation still depends to a large extent on personalty taxation and will apparently have to do so unless some form of income levy is substituted.

In 1932, the Illinois Supreme Court invalidated a State net income tax on the ground that it was a property tax whose graduation feature was held to conflict with the *ad valorem* principle of the first clause of Section 1 of the Revenue Article.[33] However, classification, including graduated rates, is constitutionally permissible for occupation and franchise and privilege taxes.[34] Hence, it would seem that the State might validly exact a graduated tax, measured by net income, on individuals and corporations for the privilege of creating and receiving income. Perhaps, instead, the State might adopt a program of graduated occupational taxation based upon net income without violating the uniformity requirements of Section 1. Precedent for such taxation may be found in the decision validating a graduated inheritance tax levied upon the privilege of inheriting property[35] and on decisions upholding the net receipts tax levied upon foreign fire insurance corporations for the "doing of business" in Illinois.[36] Until passed upon by our Supreme Court, of course, no one can foretell with certainty whether a graduated privilege or occupation tax measured by net income is constitutional. If such taxation were sustained, no exemptions (except those specified in Section 3) could be contained therein because Sections 1 and 3 of Article IX would require the imposition of at least nominal rates on low-bracketed income.

Many serious students of tax reform in Illinois believe that a graduated income tax would be more equitable than either the general property tax or the Retailers' Occupational Tax because the former has thus far overburdened real estate through the escape from taxation of intangible personal property, and the latter tax ignores ability to pay. Unless more intangibles can be reached through legislative classification of property, these persons believe that the

31. *Illinois Tax Problems* (Illinois Tax Commission, 1940), p. 138.

32. Cooley, *The Law of Taxation* (4th ed., 1924) sec. 39.

33. See note 2, *supra*.

34. See notes 3 and 4, *supra*. But in *The People v. Union Electric Power Co.*, 392 Ill. 271, 286 (1946), the Court said the principle that "the ratio must be uniform" applies to the second clause of Section 1 as well as to the first clause.

35. See note 4, *supra*.

36. *People v. Kent*, 300 Ill. 324 (1921); *People v. Barrett*, 309 Ill. 53 (1923).

taxing authorities should be free to substitute a graduated income tax for a property tax on intangibles, which are largely escaping taxation.

Some critics of the Illinois tax system favor a constitutional amendment to permit the levying of a graduated net income tax, in order to reach those who are at present escaping their fair share of state and local taxation. If such an amendment is ever offered to the voters, it should specify that if a state income tax were enacted, the receipts therefrom should be divided between state and localities in certain proportions, so that the farming population would not be unduly favored by benefits paid for by tax receipts from urban areas. The subject of exemptions should be covered. There might also be a provision in the amendment empowering municipal bodies, if authorized by the Legislature, to levy a graduated net income tax regardless of the uniformity provisions of Sections 9 and 10. To make the amendment more palatable politically, a clause could be included which would limit the permissible graduations.

Because of the opposition of influential groups, proponents of an amendment of Article IX which would permit a conservatively graduated income tax should realize that such an amendment will only receive popular approval if the voters are schooled to realize, *inter alia*, the following salient points:

1. Existing law requires that personal property be assessed at full value. Enforcement of this requirement would result automatically in the confiscatory taxation of personal property. This is a dangerous weapon for an assessor to possess and could be buried by the substitution of a reasonable income tax.

2. Under the present Constitution, the Legislature is seemingly empowered to levy burdensome privilege or occupational taxation measured by net income. Hence, an amendment to permit the levy of a really fair type of income tax, with appropriate exemptions, would actually be a safeguard.

3. The present system of taxation results in public perjury.

4. Because of constitutional limitations the tax burden is now distributed inequitably in Illinois.

Attempts to Revise the Revenue Article

Twice the people of Illinois have had opportunities to express themselves on the Revenue Article of the 1870 Constitution through the state-wide referendum device authorized by the still extant Public Policy Act of 1901 (Laws 1901, p. 198, secs. 1, 2; Smith-Hurd Ill. Ann. Stats., Ch. 46, secs. 28-1, 28-2, 28-3). In the 1904 referendum, a large majority voted that the Legislature should submit an amendment enabling local governments to adopt such system of assessing and levying taxes as the voters thereof might desire. Again, a large majority in 1912 voted that an amendment should be submitted providing for the classification of property with taxes uniform as to each class.

Four amendments of the Revenue Article have been submitted to the voters. The 1916 amendment would have permitted the classification of personal property and the exemption from taxation by general law. There were 656,298 votes for this amendment and 295,782 against it.

The 1926 amendment would have permitted the taxation of persons, property and income free from the limitations of Sections 1, 3, 9, and 10 of Article IX. Real property would not have been classifiable except that mineral and reforestation lands might be in different classes. Again, exemptions would be permissible by general law. A two-thirds vote by each House was to be required to put into effect any of the innovations envisaged by the amendment. There were 651,768 votes for this amendment and 476,455 against it.

The 1930 amendment was similar to the 1926 one as to real estate [illegible] the

general assembly was otherwise to have untrammeled power to enact revenue laws. There was a special provision, Section 3, providing for the allocation of income tax revenues among the State, counties and municipal corporations. The provisions of Section 9 were to be broadened to include "sanitary districts, park districts and other municipalities," and the uniformity clause was removed as to taxes assessed and collected by municipalities. Section 10 was to be liberalized so that the State could impose income taxes upon inhabitants of municipal corporations for corporate purposes, provided that the proceeds were allocated under the revised Section 2 mentioned above. The uniformity clause was excised from Section 10. Only 371,812 voted for this amendment and 513,861 were against it.

The 1942 amendment would have permitted the General Assembly to exempt sales of food from the Retailers' Occupational Tax. At the election, 979,892 voted for this measure and 346,232 against it.

The Constitution of 1922 was badly defeated at the polls when 921,398 voted against it and only 185,298 were in its favor. *Inter alia*, it would have permitted an ungraduated income tax on income from intangibles in lieu of a property tax on intangibles. It would have also permitted a graduated net income tax, but with the highest rate no more than three times the lowest. A number of specific exemptions were provided. Forested property was to be classified or exempted. There was a special provision permitting a tax buyer to waive his title and to proceed through foreclosure to have the property sold by a court and the proceeds of the sale, distributed to him and the owners of the property.[37]

[37] The revenue provisions of the proposed 1922 Constitution have been severely criticized. See Davis, "Defects and Causes of Defeat of the Proposed Constitution of 1922," 26 Chicago Bar Record 276, 278, 280 (1945). The language used in each attempt to revise the Revenue Article appears in the Chicago Daily Law Bulletin of February 10, 1938, p. 2 *et seq.* and in I Laws of Illinois, 62nd General Assembly (1941), p. 1326.

On the foregoing seven occasions between 1904 and 1942, a majority of those voting at the election never expressed themselves in favor of amendment of the Revenue Article, although a majority voting *on this subject* favored amendment five out of the seven times. These statistics show that without a general public drive, it would be extremely difficult to secure an overall revision of the Revenue Article under the present amending clause of our Constitution requiring approval by a majority of all those voting at a general election (rather than by a majority voting on the particular proposal). Since some of the proposed amendments were more popular than others, it would seem prudent to draft amendments to the Revenue Article which could be submitted seriatim to the voters, so that at any rate some desirable improvements could become effective. According to past experience, if revisions of the Revenue Article were submitted as one proposal at the polls, the proposal would seem doomed to failure, at least unless a Gateway Amendment or an otherwise revised system of voting on the adoption of amendments were by then operative.

Conclusion

Illinois is one of the five remaining states whose constitutions have not been held to permit the classification of property for purposes of property taxation. Consequently, assessing officials in Illinois have been forced to classify property administratively. Administrative classification contravenes authoritative judicial statements interpreting the Revenue Article of the Constitution. Despite administrative classification a great deal of intangible personal property is escaping taxation. Legislative classification should be attempted to increase the tax revenues from intangible personal property and to decrease perjured returns. In the light of dicta in recent decisions of the Supreme Court of Illinois, legislative classification might survive attack in the courts without constitutional amendment, but otherwise the Constitution should

be amended to permit it. In order to insure its adoption, such an amendment should state that income taxes were not thereby being authorized.

Many tax experts believe that the Legislature and local taxing officials should be empowered by constitutional amendment to levy a graduated net income tax if attempts to levy graduated occupational or privilege taxes measured by net income are invalidated. If decided upon, an amendment authorizing a graduated net income tax should be submitted to the voters separately from an amendment authorizing legislative classification of property in order not to jeopardize the passage of the classification amendment. Any other amendments of the Revenue Article should also be submitted separately at the polls so that the less popular amendments will not prevent other amendments from being adopted.

As it has been judicially interpreted, Article IX of the Constitution does not give the Legislature leeway to determine the fairest type of taxation. Certainly under a democratic form of government, the Legislature should not be hamstrung from enacting taxes it considers desirable. To reserve to the public a proper measure of protection, the legislative powers of taxation should not be completely unrestricted, and in fact, no constitutional amendment removing all restrictions would have the slightest chance of adoption.

To secure an expert and unbiased scheme, it would seem preferable to revise the Revenue Article through the medium of a constitutional convention rather than through legislatively drafted amendments. Revisions secured through a constitutional convention would also have a better chance of success at the polls[39] since they could be submitted at a special election at which the ballots would contain no other distracting matter. At the election, the public should be given the opportunity to approve only those revisions it favors. Most of the opposition to constitutional revision comes from opponents of an income tax. An constitutional convention will be acutely aware of this opposition and might well decide not to jeopardize the chances of approval of needed reforms in the Revenue and other Articles by authorizing the imposition of a graduated net income tax. Those who fear an income tax would have a chance at the convention to sponsor an amendment of Section 2 of the Revenue Article which already seemingly empowers the Legislature to authorize privilege and occupational taxes measured by net income. As shown, entirely disregarding the income tax problem, the Revenue Article should be revised in several respects. Revision of our State constitution is so vital to progressive government in Illinois that this program must not be delayed by any personal predilections as to income taxes.

38. See Wittwer, "Illinois Constitution and the Courts," 15 Univ. Chicago L. Rev., 53, 70 (1947); *Illinois Tax Problems* (Illinois Tax Commission, 1940) p. 335.

39. In order to secure adoption of a legislatively drafted amendment without a Gateway Amendment, it would seem necessary to change the present method of voting by "party circle" or similar device. See *Illinois Tax Problems* (Illinois Tax Commission, 1940) p. 354.

CANONS OF PROFESSIONAL ETHICS

7. Professional Colleagues and Conflicts of Opinion.

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer are unworthy of those who should be brethren at the Bar; but nevertheless it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or negligent counsel, generally after communication with the lawyer of whom the complaint is made.

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Roy Massena

Roy Massena, a member of the Chicago Bar Association since 1919, passed away in St. Luke's Hospital on Friday, September 26, 1947. He was born in Marshall County, Indiana, August 30, 1881, the son of Adam H. and Elizabeth Massena. He was graduated from Wabash College with an A.B. degree in 1902; and from the University of Chicago with the J.D. degree cum laude, in 1917. He was a member of Delta Tau Delta, Phi Delta Phi and Phi Beta Kappa fraternities.

Following his admission to the Illinois Bar in 1917 he became city attorney for Blue Island, Illinois, in which capacity he served until 1935. He was attorney for the Board of Review of Cook County, Illinois from 1918 to 1932 and a Master in Chancery of the Circuit Court of Cook County from 1936 to 1946. In January 1926 he became a member of the law firm of Deneen, Healy & Lee, which became Deneen & Massena about May 1, 1936. He continued his association as a law partner of the late Senator Charles S. Deneen until the senator's death in 1940, after which he continued to practice under the old firm name with other partners and associates.

From the time Mr. Massena became a member of the Chicago Bar Association he took an active part in the work of the association and continued to give freely of his time, energy and unusual abilities until his death. At various times he served as a member of the Board of Managers and on the following committees: Municipal Court, Rules of Court, Military Service, War Activities, Grievance and Association Meetings. He also was a member of the American Bar Association, the Illinois State Bar Association, Chicago Law Institute, Art Institute of Chicago, Chicago Natural History Museum, Baptist Church and Masonic Lodge. His club memberships included Lake Shore, Midlothian Country and Tippecanoe Lake Country.

In 1907 he was married to Mabel Hood at Warsaw, Indiana. His residence was in Blue Island, Illinois. In addition to his widow he is survived by one son, Frederick, at present attending Wabash College, and one sister, Mrs. C. A. Rovenstine of Elkhart, Indiana.

Mr. Massena was an extensive reader of good literature and he was very much interested in encouraging young men to acquire an education. He also took an active part in civil affairs and religious and other charities. He was a brilliant student and a lawyer of exceptional ability. He liked people and enjoyed practicing law. A spirit of friendliness always existed when he was in the office or court room. One of his friends upon hearing of his death said "A bit of sunshine has gone out of our lives." The Chicago Bar Association and the legal profession has lost an able and worthy member.

CANONS OF JUDICIAL ETHICS

17. Ex parte Communications.

He should not permit private interviews, arguments or communications designed to influence his judicial action where interests to be affected thereby are not represented before him, in cases where provision is made by law for ex parte application.

While the conditions under which briefs of argument are to be received are matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to a judge intended or calculated to influence action should be made known to opposing

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